

(25,195)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 912.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

GEORGE H. WINTERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

GEORGE H. WINTERS, Plaintiff,
vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Complaint.

Plaintiff for and as his complaint against the above named defendant, states and avers:

That the defendant now is and at and during all the times herein mentioned and referred to has been a corporation and as such the owner and operator as a common carrier of a line of railway extending in and through the states of Minnesota, Iowa and other states, with its headquarters in the state of Minnesota. That defendant's said line of railway is an interstate highway and now is and at and during all the times herein mentioned and referred to has been operated by defendant in the hauling, as such common carrier, of interstate commerce between said several states and other states and countries. That at the time plaintiff was injured as hereinafter set out, he was employed by defendant in said interstate commerce business.

2 That the plaintiff, George H. Winters, is a minor, being under the age of twenty-one years, and the Capitol Trust Company of St. Paul, Minnesota, has been by said court duly appointed guardian ad litem for the purpose of representing said minor in the prosecution of this action, and it has accepted said trust.

That on October 21st, 1912, the said plaintiff, George H. Winters, was in the employ of defendant and was working for it in the city of Marshalltown, in the state of Iowa, in defendant's said business of a common carrier of interstate commerce. That the particular work which plaintiff was doing on said date and at the time he was injured, as hereinafter stated, was helping to make running repairs upon a locomotive engine which the defendant owned and was operating upon its said line of railway in the doing of said interstate commerce business, and the said locomotive had been customarily so used by defendant and was intended so to be used; that said work consisted in putting new tire on the driving wheel of said locomotive, and to do so said wheels of said locomotive had to be raised off of the rails on which said locomotive was standing, and it was so raised by the use of jacks; that plaintiff received the injuries herein complained of by virtue of the sudden dropping of one end of said locomotive which was resting upon a jack; that the said jack, by virtue of the facts herein stated, gave way and permitted said locomotive to so drop; that said jack

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was insufficient and defective to the knowledge of defendant, and it carelessly and negligently so used said jack; that defendant carelessly and negligently permitted the said one end of said locomotive to rest upon said one jack, which jack was at one side of said locomotive, that said jack was operated by the use of a lever, and defendant carelessly and negligently furnished an improper lever; that at the time plaintiff was injured, defendant carelessly and negligently left said improper lever in said jack and the same did cause said jack to give way and so permit said locomotive to so drop; that said handle should not have been left in said jack; that if a proper handle had been furnished by defendant, the leaving of it in said jack would not have caused said jack to give way and permit said locomotive to so drop.

That defendant carelessly and negligently furnished and provided an incompetent servant to use and handle the said jack and lever which so caused said locomotive to so drop; that defendant carelessly and negligently failed and neglected to instruct the said servant who was so handling and using said jack and lever which so caused said locomotive to drop, as to how to use said jack and the said lever, and as to not leaving said lever in said jack; that defendant carelessly and negligently failed to provide and enforce rules and regulations for the proper and safe doing of said work; that

4 defendant carelessly and negligently adopted and was carrying out an improper and dangerous method of doing said work; that defendant carelessly and negligently failed and neglected to warn and instruct plaintiff of the dangers incident to the doing of said work; that defendant carelessly and negligently failed and neglected to furnish and provide proper and sufficient tools and appliances for the doing of said work, and by and through each and all of said facts, defendant did carelessly and negligently cause, permit and allow the said locomotive to so drop and fall upon one of plaintiff's hands when he was so engaged and so working, and his said hand was thereby crushed and bruised and part of it had to be and was amputated because of said injuries, and said injuries have wholly and completely and permanently disabled plaintiff's said hand and disfigured the same, and said injuries have caused and will in the future cause plaintiff to suffer great bodily pain and mental anguish, and by virtue of all the facts herein averred, plaintiff has been damaged in the sum of twenty-five thousand dollars (\$25,000.00).

That at the time of receiving said injuries, plaintiff was in the exercise of due care on his own part and no want of care on his part contributed to his said injury.

That the work which plaintiff was doing when so injured, was in connection with the use and operation by defendant of its said line of railway, and the work which defendant was so doing upon and with said locomotive at the time plaintiff was so injured, was in connection with the use and operation of said line of railway, 5 by defendant. That plaintiff was so injured in the said city of Marshalltown in the said state of Iowa.

That at the time plaintiff was so injured, there was in full force

and effect in the state of Iowa, statutory laws of said state which were and are as follows:

"Sec. 2071. Liability for negligence or wrongs of employees. Every corporation operating a railway shall be liable for damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agent or by any mismanagement of the engineers or other employees thereof, and in consequence of the wilful wrongs, whether of commission or omission of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway in or about which they shall be employed and on contract which restricts such liability shall be legal or binding. Nor shall any contract of insurance, relief or indemnity in case of injury or death entered into prior to the injury between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs or legal representatives after the injury from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section, but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received."

"Sec. 1. Contributory negligence. That the law as it appears in Section Twenty Hundred and Seventy-one (2071) of the supplement to the Code of 1907 be amended by adding after the period at the end of said section, the following:

"That in all actions hereinafter brought against any such corporation to recover damages for the personal injury or death of any employee under or by virtue of any of the provisions of this section, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier or corporation of any statute enacted for the safety of employees contributed to the injury or death of such employee; nor shall it be any defense to such action that the employee who was injured or killed assumed the risks of his employment." Approved March 25th, A. D. 1909.

That by virtue of the facts herein stated, plaintiff has been damaged in the sum of Twenty-five Thousand Dollars (\$25,000.00).

Wherefore, plaintiff demands judgment against said defendant for the sum of Twenty-five Thousand Dollars (\$25,000.00), together with his costs and disbursements herein.

BARTON & KAY,
Attorneys for Plaintiff.

816-818 New York Life Bldg., St. Paul, Minnesota.

GEORGE H. WINTERS, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Amended Answer.

Comes now the above named defendant and for its amended answer to the complaint of the plaintiff herein made pursuant to permission granted upon the trial of said cause in open court on the 11th day of December, 1913, respectfully states:

Defendant admits that at the time stated in plaintiff's complaint it was and is a corporation and owned and operated a railroad in and through the states of Minnesota, Iowa and other states, and that it was and is engaged in interstate commerce.

Admits that on October 21st, 1912, the plaintiff, George H. Winters, was in the employ of the defendant and was working for it in the city of Marshalltown, in the state of Iowa, as a machinist's helper, but this defendant denies that said George H. Winters was employed by it in its business of interstate commerce.

This defendant admits that at the time and place stated the said George H. Winters received some injury to one of his hands.

Except as hereinbefore admitted, this defendant denies each and every allegation in said plaintiff's complaint contained and
8 each and every part thereof.

Further answering said complaint, this defendant avers that the injuries received by the said George H. Winters at the time and place stated were due solely to his own carelessness and inattention to his own safety and because of the failure of the said George H. Winters at said time to observe for his own protection ordinary care, and that such omission on the part of the said George H. Winters was the proximate cause of any injuries by him received.

Further answering said complaint this defendant alleges that the particular work being done by the said Winters was dangerous only because of the manner in which said Winters chose to perform the same; that the danger of performing the work in the manner selected by him was perfectly obvious to said Winters; was fully comprehended and appreciated by him, and that he assumed the risk of the very consequences which came to him from so performing said work.

Wherefore, defendant prays that plaintiff take nothing by his said action, that the same be dismissed and that defendant have and recover herein its costs and disbursements as provided by law.

W. H. BREMNER,
F. M. MINER,
Attorneys for Defendant.

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GEORGE H. WINTERS, Plaintiff,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Reply.

Plaintiff for his reply to the answer of the defendant in the above entitled action, states and avers:

That he specifically denies the allegations of said answer, and every part and portion thereof, and the whole thereof.

Wherefore, plaintiff reaffirms the allegations of his complaint and continues to pray for the judgment therein demanded.

BARTON & KAY,
Attorneys for Plaintiff.

816-818 New York Life Bldg., St. Paul, Minnesota.

GEORGE H. WINTERS, Plaintiff,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Settled Case.

This case came on for trial before Hon. William Louis Kelly, J., with a jury, on the morning of Monday, March 22, 1915, at 10:15 o'clock. Barton & Kay appeared as attorneys for plaintiff, and F. M. Miner on behalf of defendant.

The Court: The defendant calls the attention of the court to the fact that this plaintiff, who appears by guardian, is now twenty-one years of age.

Mr. Barton: The plaintiff moves to strike from the record the name of the guardian wherever it appears.

The Court: Yes.

Mr. Miner: I suppose that under the statute it is essential that your Honor should make an order with reference to the amount of the bond.

Mr. Barton: The statute fixes the amount.

The Court: \$75, I think the statute fixes.

Mr. Miner: That was the minimum amount. Judge Hanft in the last case tried here, in view of the nature of the case, fixed the bond at \$250.

The Court: Sometimes we make a difference.

Mr. Miner: This is the third trial of the case, and if the defendant should happen to prevail here \$75 would not cover its costs, and, of course we have no recourse to the plaintiff in the absence of a bond. I suggest that to your Honor.

The Court: I suppose an additional bond ought to be given. Make it \$200.

Jury empaneled and sworn.

Case opened on behalf of plaintiff by Mr. Barton.

Mr. Barton: Mr. Miner and I have agreed, your Honor, to a stipulation, the agreement being that we will make the same stipulation upon this trial that we made upon the last trial. The stipulation is in the printed record commencing on the bottom of page 10 and on 11. It is stipulated and agreed between the parties in this case as follows: The locomotive in question had been used in the hauling of freight trains over defendant's line of road referred to in the pleadings, which freight trains hauled both intrastate and interstate commerce, and that it was so used after the plaintiff's injury, and that the last time the engine was used was on the 18th day of October when it came into Marshalltown to pulling a freight train; that the first time it was used after plaintiff's injury was on the 21st day of October, when it pulled such a freight train out of Marshalltown.

Mr. Miner: That is the stipulation.

Mr. Barton: Yes. The year isn't stated here. I suppose you will agree that the year referred to is 1912?

Mr. Miner: 1912.

GEORGE H. WINTERS, sworn on his own behalf, testified:

By Mr. Barton:

Q. Your home is in Marshalltown, Iowa?

A. Yes, sir.

Q. How old are you?

A. Twenty-one years old.

Q. When were you twenty-one?

A. The 16th day of last June.

Q. Did you at one time work for the Minneapolis & St. Louis Railroad Company?

A. Yes, sir.

Q. Where?

A. Marshalltown, Iowa.

Q. In what capacity did you work for the railroad company?

A. Well, I worked as a machinist helper.

Q. At what place?

A. At Marshalltown, Iowa.

Q. In what building?

A. In the Minneapolis & St. Louis shops there.

Q. Was your work confined to any particular part of the shops, or not?

A. No, sir.

12 Q. How long did you work for the company?

A. Well, I started to work in June, I believe it was, the last time that I worked for them.

Q. What year?

A. 1912.

Q. And you worked how long then?

A. Until October the 21st.

Q. The same year.

A. Yes.

Q. That is the date you got hurt on?

A. Yes, sir.

Q. You say the last time you started to work in June; had you worked for them before that?

A. Yes, sir.

Q. In what capacity?

A. In the boiler shop.

Q. What were you doing there?

A. I was an apprentice.

Q. Boilermaker's apprentice?

A. Yes, sir.

Q. How long did you work in the boilershop?

A. I worked a year and nine months, I believe it was.

Q. And had you worked for them before that?

A. Yes, sir.

Q. In what capacity.

A. In the roundhouse.

Q. What were you doing then?

A. Why, I was helping boiler washing.

Q. That is, washing out the boilers with water?

A. Yes.

Q. And how long had you been doing that kind of work?

13 A. Well, I don't just recall now how long it was.

Q. Is that your entire experience?

A. Yes, sir.

Q. In the railroad business?

A. Yes, sir.

Q. What time of day was it that you got hurt?

A. It was between 4 o'clock and 4:30.

Q. In the afternoon?

A. Yes, sir.

Q. You were working days?

A. Yes, sir.

Q. What kind of work were you doing the day you got hurt?

A. We were putting on tires.

Q. On what?

A. On the locomotive.

Q. On what part of the locomotive?

A. On the drivers.

Q. The driving wheels. How many of you were engaged in that work of putting tires on the driving wheels of the locomotive?

A. There were three of us.

Q. Who besides yourself?

A. Mr. Larson and Mr. Conn.

Q. Who was Mr. Conn?

A. He was the machinist.

Q. You and Larson were then helping him?

A. Yes, sir.

Q. When did you commence the work on that particular engine of changing the tire?

14 A. Well, we started in the morning, but I don't know just what time it was. It was early in the morning.

Q. What was the first thing that was done with the engine with reference to putting on the tire?

A. Well, we got a gasoline heater.

Q. What did you do with that?

A. We brought it over to the engine.

Q. And what did you do then?

A. Well, we started putting the tires on.

Q. What did you do with the gasoline heater after you got it?

A. Well, we set it there beside the engine and connected it up.

Q. And what did *that* do then?

A. Well, he started putting the fire on?

Q. What was the idea of putting the fire on?

A. Why, to heat the tires to put them on.

Q. Why were you heating the tires?

A. Why, to expand them.

Q. Did you folks take the old tire off?

A. Why, yes, sir.

Q. I suppose you did that before you put on the new ones?

A. Oh, yes.

Q. Tell us about that. How long did it take you to take off the old tire?

A. Well, I don't recollect now how long it was.

Q. Did you take all the old tires off first, or did you take one off and put on a new one and then go to the next wheel?

A. I don't recollect that at all.

15 Q. But you did take off the old tire?

A. Yes, sir.

Q. How many driving wheels were there on that engine?

A. There were two on a side.

Q. Four, then, in all?

A. Yes, sir.

Q. Did you get that work of taking off the old tire and putting on the new ones finished before you got hurt?

A. Yes, sir.

Q. Where was the engine at the time you done that work?

A. It was in the roundhouse.

Q. On a track?

A. Yes, sir.

Q. How many tracks were there in that roundhouse?

A. Well, there is fourteen, I believe.

Q. That is, in the enclosure where you were doing that work?

A. Yes, sir.

Q. The roundhouse is entered from a turntable, I suppose?

A. Yes, sir.

Q. And these fourteen tracks all center on that turntable?

A. Yes, sir.

Q. So that from the turntable an engine can go in upon any one of those fourteen tracks?

A. Yes, sir.

16 Q. This engine that you were so putting the new tire on was upon which one of those fourteen tracks?

A. Well, I don't know just what track it was on, I think it would be the twelfth track or the thirteenth track.

Q. Which way was this engine headed, in or out of the round-house?

A. It was headed in.

Q. Was the fire in or out of the engine?

A. It was out.

Q. As so headed in this track, was it near the center of the round-house or to one side or the other?

A. Well, it was up on one side.

Q. And which side as you entered it, on the left or the right-hand side?

A. Well, it was on the right-hand side.

Q. That is, of the roundhouse?

A. Yes, sir.

Q. And was there one or two or how many tracks between that engine and the wall or side of the roundhouse on the right-hand side?

A. Why, there was only one.

Q. Was there a locomotive upon that one track that day when you were working there?

A. Yes, sir, I believe there was.

Q. Was there a locomotive upon the third track, which would be to the left of the one you were working on?

A. Yes, sir.

Q. How close were those engines together that stood upon adjoining tracks?

A. Well, I should judge they would be fifteen foot.

17 Q. Of open space between them?

A. Yes, sir.

Q. Well, were the engines always headed in, or not?

A. Well, sometimes they are and sometimes they are not.

Q. Have you any recollection about how these other two engines that you refer to, the one upon the first track and the one upon the third one, were headed?

A. Well, they were both headed in.

Q. Were the driving wheels resting upon the rails or not, when you were putting this new tire on?

A. They were raised off of the rails.

Q. And how were they raised off of the rails?

A. Well, the engine was jacked up.

Q. Had you helped to jack it up?

A. No, sir.

Q. Do you know when that jacking-up process was done?

A. Well, on Sunday.

Q. On Sunday?

A. Yes, sir, the 20th.

Q. What day of the week did you get hurt on?

A. Monday.

Mr. Miner: Well, now, do you say that from personal knowledge or from something that has been told you?

Witness: Well, I say that from personal knowledge.

18 Mr. Miner: You saw it done, did you?

Witness: Well, I didn't see it done, no, only from what I heard there they jacked it up on Sunday.

Mr. Miner: Yes, but you don't know that of your own knowledge?

Witness: No, sir.

Q. How many jacks were there under it?

A. Well, there were four in the back, was all, when we come there.

Q. What do you mean by that, what part of the engine do you refer to?

A. Well, on the rear.

Q. On the rear of the engine?

A. Yes.

Q. How were they placed, under what part of the rear part of the engine?

A. Well, they was placed right underneath a casting along the back end.

Q. What was the condition of the track between the rails where this engine was standing that you were working on?

A. Well, I didn't pay no particular attention to that.

Q. Well, were there ties on which the rails laid, or what did the rails lie on?

A. Well, they laid on a casting along—there was a pit along there.

Q. That is what I wanted to get at. Now, you say there was a pit along there; where was the pit with reference to the engine?

A. It was right underneath the engine.

19 Q. And how long was that pit?

A. Oh, I should judge about thirty feet.

Q. How long was the engine?

A. Well, the engine is a little longer than the pit.

Q. You think the engine was a little longer than the pit?

A. Well, I don't know for sure whether it was or not.

Q. Was the tender or tank part of the engine attached to the engine?

A. No, sir.

Q. Was the tank in the roundhouse at all?

A. Yes, sir.

Q. Was it on this same track—the tank?

A. Yes, sir.

Q. How much space was there between the tank and the engine as they stood there when you were doing your work?

A. Well, I should judge five or ten feet.

Q. Now, where were these four jacks that you have said were under the rear end of the engine with reference to the pit?

- A. Well, they had a log across the pit, and they were setting on the log.
- Q. You say these jacks were under a casting that run across the rear end of the engine; were the jacks in line?
- A. Yes, sir.
- Q. Where were they with reference to the sides of the engine?
- A. Well, there was two of them on a side.
- Q. How close together?
- A. Oh, I don't remember that.
- Q. Now, when you say that there were two on a side, how near the side of the engine?
- A. Well, they was right out to the end of this casting.
- Q. And the casting came out how near to the side of the engine?
- A. Well, I don't recollect.
- Q. Well, how long was this casting that these four jacks were under?
- A. Oh, it probably was five foot.
- Q. Then it wasn't as wide as the engine itself?
- A. Well, I don't know.
- Q. And you say there were two of those jacks under each end of that casting?
- A. Yes, sir.
- Q. What kind of jacks were they?
- A. Why, they were small screw jacks.
- Q. How are those screw jacks operated?
- A. Why, with a bar.
- Q. And how do you use the bar?
- A. Well, they got a hole in the head of them, and you just turn them around that way (indicating).
- Q. Turn them around in what way?
- A. Well, just turn them around, they screw up.
- Q. Does that lever work up and down at all?
- A. No, sir.
- Q. Screwed around in a circle?
- A. Yes, sir.
- Q. Did you that day have anything to do with those four jacks under the rear end of that locomotive?
- A. No, sir.
- Q. Did you either raise or lower them?
- A. No, sir.
- Q. What was under the front part of the engine?
- A. Why, there was a block across there.
- Q. What else?
- A. Well, that is all that I remember, is the block being across.
- Q. Was the front part of the engine raised off of the tracks also?
- A. Yes.
- Q. How?
- A. Well, it was raised up and a block was across there.
- Q. Well, what raised the blocks?
- A. On top of a truck.
- Q. Well, what raised the trucks then?

A. Well, the trucks weren't raised up.

Q. Well, what was raised?

A. The front end of the engine.

Q. How did you raise it?

A. Well, we didn't raise it.

Q. Well, how was it raised?

A. Well, I presume——

Q. What did it stand on?

A. I presume it was on that block.

Q. You have said that this engine rested upon jacks and you have told us about four jacks under the rear end; what did the front end of it rest on?

22 A. It was resting on this timber across the top of the truck?

Q. What was under the timber?

A. Well, the truck.

Q. Were there any other jacks under that engine?

A. No, sir, not then.

Q. Well, at any time that day?

A. Yes, sir.

Q. We are talking now about the day, no particular hour. What was there under the front end of the engine any time that day?

A. Well, there was two hydraulic jacks.

Q. Were they under the engine when you first commenced to work at it that day?

A. No, sir.

Q. Those screw jacks that were under the rear end, you say, were there when you first went there that day?

A. Yes, sir.

Q. What time of that day did these hydraulic jacks appear upon the scene?

A. Well, we got them some time in the afternoon.

Q. What was the reason for getting them?

A. They wanted to jack the engine up to let it down.

Q. Who did get them?

A. I and Larson.

Q. And did you get them of your own accord, or did some one tell you to get them?

A. Well, they told us to go and get a couple of
23 jacks.

Q. Who did?

A. Conn, the machinist.

Q. Tell the court and jury as nearly as you can what Conn, the machinist, said to you about getting those jacks.

A. Well, he says you boys go and get some jacks now, we got to jack this engine up.

Q. And did you do that?

A. Yes, sir.

Q. Where did you go to get the jacks?

A. Well, I don't recollect now where we got them, but we found them around there some place.

- Q. What kind of jacks did you get?
 A. Hydraulic jacks.
 Q. You say you and Larson went and got the jacks, the hydraulic jacks. How many did you get?
 A. We got two.
 Q. Now, did each of you get one, or did you both work at the same jack in getting it?
 A. Well, I don't recollect that.
 Q. What did you do with the jacks when you got them?
 A. Well, we brought them to the engine.
 Q. And what did you do with them when you got them to the engine?
 A. Conn told us to put them under the front end there and jack it up.
 Q. And where did you put them?
 A. Right under the front end.
 Q. Whereabouts under the front end?
 24 A. Under a beam that runs across there.
 Q. Across where?
 A. In front of the engine.
 Q. Whereabouts under that beam did you place the jacks?
 A. One at each end of it.
 Q. How long was that beam?
 A. Oh, I should judge it is about eight feet.
 Q. Was it as long as the engine was wide?
 A. Yes.
 Q. How close to the ends of that beam did you place the jacks?
 A. Well, I don't remember.
 Q. Was this pit that is under the engine, did it extend clear out from under the front end of the engine?
 A. No, sir; I don't believe it did.
 Q. Where were these jacks placed with reference to the rails that the engine stood on?
 A. Well, they was right outside of the rails.
 Q. Having secured the jacks and so placed them, then what did you do?
 A. Well, they told us to jack it up, and we jacked her up.
 Q. Do you know how heavy those hydraulic jacks were?
 A. Well, I don't know, no.
 Q. Could you carry one?
 A. Well, I don't know whether I could or not.
 Q. You don't recollect whether you did?
 A. No, I didn't.
 Q. How did you get them to the engine?
 25 A. Well, we rolled them over there.
 Q. How were those hydraulic jacks operated?
 A. With a lever.
 Q. How did the lever work?
 A. Up and down.
 Q. Was that lever permanently attached to the jacks or not?
 A. No, sir.

Q. How was it placed in the jacks?

A. Well, there was a little socket on the side, and we placed it in there.

Q. To raise the jack, what did you do?

A. Well, you just pump up on it.

Q. How did you work the lever?

A. Up and down motion.

Q. Was there any special lever for those jacks?

A. Yes, sir.

Q. What was it like?

A. Well, it has a long handle with a lug on it to keep the jack from going down.

Q. On what part of it was this lug?

A. Well, it is on the end that went into the socket.

Q. What was the use of that lug?

A. To keep the jack from going down.

Q. How did it do that?

A. Well, there is a little lug there and it stops right there and it can't go no further.

Q. What stops?

A. Why, the handle.

Q. In raising the jack, which way is the pressure applied to that lever, upwards or downwards?

26 A. Well, it is upward.

Q. Well, the jack goes up, but does the lever go up when—

A. No, the lever goes down.

Q. The lever is raised up without force, and then forced down, is that the idea?

A. Yes, sir.

Q. And that forces the head of the jack up?

A. Yes, sir.

Q. Now, what do you do if you want to lower the head of the jack?

A. Well, you turn the wrench over and just push down on it.

Q. And how far do you have to push the lever down?

A. Well, below a catch there, or something.

Q. How's that?

A. Below a catch.

Q. What catch?

A. Well it is on the jack there.

Q. Below the point where you would operate if you were raising it?

A. Yes, sir.

Q. Does this lever go into the same socket whether you are lowering or raising it?

A. Yes, sir.

Q. At the time that your machinist told you to get these jacks what had you done with the tire up to that time?

A. Well, we had put all the tires on.

27 Q. So that the work of putting on new tires had been finished before you had anything to do with these hydraulic jacks?

A. Yes, sir.

Q. You spoke of trucks under the front part of the engine; what do you mean?

A. Well, they are just a little truck there, with wheels on it.

Q. How many wheels?

A. There is four on it, two on a side.

Q. Two on each side, so that the front part of the engine had rested upon that truck and the rear part of the engine upon those four screw jacks during the time that you were putting on the new tire?

A. Yes sir

Q. You spoke about the front end of the engine resting upon a beam, or there being a beam under it. What did you refer to,—something permanent attached to the engine?

A. No, sir.

Q. What then?

A. Why, they just had a long log right on top of the truck, and the engine was down on that.

Q. So that the engine wasn't resting directly upon the trucks?

A. No, sir.

Q. But upon a log that was placed on top of the trucks?

A. Yes, sir.

Q. You refer to it as a log. Was it a rough log or a square piece of timber?

A. Well, it was just a square piece of timber. It wasn't square, it was long, and perhaps a foot and a half wide, and nine inches thick.

Q. How high was this hydraulic jack?

A. Well, I think they are about twenty-six inches.

Q. Twenty-six?

A. Or something like that.

Mr. Miner: Now, what do you mean, when it was extended or when it wasn't extended?

Q. When the head was down as low as it could go, how high was it?

A. Well, I should judge it was about twenty-six inches, something like that.

Q. Now, when the head was raised up as high as it would go, how high would it be?

A. Well, I don't know just how high it would be. It probably would be about thirty inches anyhow, or more, probably.

Q. When you got the jacks and placed them did the head come up to the bottom part of that timber or that beam under the engine, or not?

A. No, we had a block on the top of the jack.

Q. What kind of a block?

A. A little square block.

Q. Of what size?

A. Well, I just don't recollect what size it was now.

Q. Well, have you any recollection as to how large it was, how thick and wide and long?

- A. Well, probably four or five inches thick and square.
- Q. And when you say square, do you mean the same width that it was in thickness?
- 29 A. Well, a little longer; it was about ten inches long, believe, or something like that.
- Q. Was it wood?
- A. Yes, sir.
- Q. You say about four or four and a half inches thick and four and a half inches wide and about ten inches long?
- A. Yes, something like that.
- Q. Now, that was placed on top of the head of the jack?
- A. Yes, sir.
- Q. Did the jack stand on the floor of the roundhouse?
- A. Yes, sir.
- Q. Now, having so placed the jacks and these blocks on top of them what was the next thing that was done?
- A. Well, the machinist told us to jack them up.
- Q. Do you refer now to the same machinist that you named Mr. Conn?
- A. Yes, sir.
- Q. And what did you do then?
- A. We jacked it up, and he pulled out that log in between there we helped him pull it out, and then he says, "Let her down."
- Q. Well, now, just a moment. You say "we jacked them up." Did you handle the one jack or did both of you work on the same jack?
- A. No, sir; I handled one and Larson handled the other one.
- Q. Which jack did you handle?
- A. On the right side.
- 30 Q. And which jack did you get and place under the engine?
- A. I got the one on the right side.
- Q. Who handled the jack on the left side?
- A. Larson.
- Q. Who jacked that one up?
- A. Mr. Larson.
- Q. Do you know what kind of a lever he used in that jack?
- A. Well, I don't know what kind of a lever he had in it at all.
- Q. You have spoken about a lever with a lug on the side of it. What kind of a lever did you use in your jack?
- A. Well, I had a regular lever with a lug on it.
- Q. Now, you say that Mr. Conn told you to jack it up and that you did jack it up?
- A. Yes, sir.
- Q. You worked on the right side, you say?
- A. Yes, sir.
- Q. Larson on the other side?
- A. Yes, sir.
- Q. At that time was there anyone else working around that engine?

A. Well, there was some fellows working in the back of around the—to one side back to the rear.

Q. Do you know how many?

A. Well, I don't just know how many there were.

Q. Was there anyone there handling those jacks besides you and young Larson?

A. No, sir.

31 Q. Now, you say Conn told you to jack it up, and did you jack it up?

A. Yes, sir.

Q. Then you say what was done?

A. Well, we took that timber out that was on top of the truck.

Q. That is the timber that the front part of the engine was resting on?

A. Yes, sir.

Q. And having taken that timber out, then what was done?

A. Well, Mr. Conn says let the engine down, so we started letting it down.

Q. How did you do that?

A. Well, we just turned the wrench over and started letting it down.

Q. You say turned the wrench over?

A. Yes, sir; that was in the jack.

Q. What do you mean by wrench?

A. Well, the handle for the jack.

Q. The lever that you had been using?

A. Yes, sir.

Q. You say you turned that over; why did you turn it over?

A. Well, so it would go down.

Q. And having turned the lever over what did you do then?

A. Well, we started letting the engine down.

Q. How did you do that?

A. Just pushed down on the handle.

Q. And what happened then?

A. The engine went down, and Mr. Conn says it doesn't
32 line up.

Q. And what then?

A. He says jack it up again.

Q. What did you do then?

A. We jacked it up again.

Q. And what then?

A. And then he got a timber and he put it alongside of the cylinder and tried to throw the engine over, and says, "Let your jack down." So I let my jack down on the right side, and then he put this timber there and couldn't throw it over that way, and he says, "Jack it up again." So I jacked my side up again, and he took the timber out.

Q. That is, this timber that he had placed against the side of the engine?

A. Yes, sir.

Q. Now, while you were doing that work of lowering and raising your side or your jack with Conn handling this timber that he

placed against the side of the engine, what was being done with the other jack, the Larson jack?

A. Well, I don't know; he didn't touch his jack, I don't believe.

Q. Well, the order that Conn gave to lower the jack——

A. Well, he says to us that—standing there in front, he says, "You boys lower your jack."

Mr. Miner: Now, which order are you referring to?

Q. Which order is that, the first one or the second or the last?

A. Well, that is the first one.

33 Q. The first order. That was after you had taken out the timber that was on top of the trucks that the front of the engine rested on?

A. Yes, sir.

Q. His order then at that time was addressed to both of you?

A. Yes, sir.

Q. Then the next order was to raise it again?

A. Yes, sir.

Q. And was that addressed to one or both of you?

A. To both of us.

Q. Then the next order, to whom was it directed?

A. Well, he told me to let my jack down.

Q. And did you comply with that order?

A. Yes, sir.

Q. You left that jack down, and then what?

A. And he put this block there. He had the block in first.

Q. Oh, he put the block in first?

A. Beside the cylinder, yes.

Q. And told you to let your jack down?

A. Yes, sir.

Q. And did you do that?

A. Yes, sir.

Q. And then what did he say?

A. Well, he says we can't do it that way, he says, jack it up again.

Q. Now, to whom was that last order directed?

A. To me.

Q. And did you jack it up again?

34 A. Yes, sir.

Recess until 2 P. M.

Q. We stopped this forenoon at the point where you said Conn had instructed you to raise your jack after he had placed this block against the side of the engine and you lowered it, then he told you to raise your jack again?

A. Yes, sir.

Q. Did you raise it?

A. Yes, sir.

Q. What was the next thing then done?

A. Well, he took the block out that was under the cylinder there, and he says, "Let your jack on down," he says, "we can't do it that

way." And I let my jack down. Then we stood there four or five minutes, and he says, "You boys take your jacks to the rear of the engine."

Q. What did you do then?

A. Then I started to take my jack out, push the block off, and when I pushed the block off, why, the engine fell.

Q. And what happened when the engine fell?

A. Well, it caught my hand on top of the jack and under the pilot beam.

Q. The block that you say you started to remove from the top of your jack, was that the block that you had placed on top of your jack when you first put the jack under the engine?

A. Yes, sir.

Q. Now, whereabouts were you at the time he gave the order to take the jacks to the rear?

A. Standing on the right side of the engine to the front.

35 Q. Where was Larson at that time?

A. He was standing right there with me.

Q. To whom did Conn address that last order?

A. He addressed it to both of us.

Q. At that time that he so addressed that last order to you was your jack tight or not?

A. No, my jack was loose.

Q. Do you recognize this jack here in court as a hydraulic or not?

A. Yes, sir.

Q. Does that look like the hydraulic jacks that you were using under that engine at the time you got hurt?

A. Yes.

Q. Does this piece of steel that I have in my hand look like the lever that you were using in your jack?

A. Yes, sir.

Q. This projection from the side of this piece of steel, is that what you refer to as the lug on one side?

A. Yes, sir.

Q. Is that the way you put this lever in the jack (illustrating)?

A. Yes, sir.

Q. Is that the way that worked, the one that you had?

A. Yes, sir.

Q. Now, the block that you refer to that you were attempting to take from the top of the jack, that laid on the head of the jack?

36 A. Yes, sir.

Q. Were there many of these hydraulic jacks about the roundhouse there?

A. Well, I didn't take no particular notice to see just—we got the first ones we saw.

Q. When the engine came down, you say it caught your hand?

A. Yes, sir.

Q. And what did it do to your hand?

A. Well, it smashed it.

Q. What was the first thing done then after your hand was caught?

A. Well, they got the jack on down and they got my hand out.

Q. What was the injury done to your hand?

A. Well, it smashed it enough to cripple it stiff.

Q. How much of your hand was caught on top of the jack?

A. All of it (left hand).

Q. What was done after you were released?

A. Well, they took me over to the shop and bathed it off with water, and then they took me to the hospital.

Q. What did they do in the hospital for you?

A. Well, they cleaned it out and sewed it up and fixed the bones.

Q. How long were you in the hospital?

A. I think it was nine weeks.

Q. Did they operate on your hand?

A. Yes, sir.

Q. More than once?

37 A. Yes, sir; twice.

Q. What portion of your hand have you left?

A. I got those three fingers and the thumb. The little finger is gone; that is, bones gone out of it.

Q. The little finger was taken entirely off?

A. Well, it was in the second operation.

Q. Well, it is entirely gone now?

A. Yes, sir.

Q. And in what condition are your other fingers?

A. They are stiff.

Q. Have you any use of the three fingers that you have left?

A. No, sir.

Q. Why not?

A. Because they are stiff and I can't do nothing with them.

Q. What amount of strength have you in them?

A. I haven't got much of any.

Q. How is your thumb?

A. Well, the thumb is pretty good.

Q. Was your thumb injured?

A. Yes, sir. Not as bad. It was smashed right along in there.

Q. Will you just come down this way? (Witness steps down and exhibits hand to jury.) Can you straighten your hand out so as to make it straight from your elbow?

A. No, sir.

Q. That position that you are holding it in now, is that a natural position?

A. No, sir.

38 Q. Can you change it from that at all?

A. No, sir.

Q. Can you straighten your fingers at all?

A. No.

Q. Can you close them any more than they are?

A. No, sir.

Q. Well, can you straighten your hand out like mine?

A. No, sir.

Q. Can't you raise your fingers up?

A. No, sir.

Q. How far back on your arm or wrist did the injury extend?

A. Well, it extended right along in there.

Q. Up to the wrist joint?

A. Yes.

Q. Is your wrist joint stiff now?

A. Yes, sir.

Q. Can you move it at all?

A. No, sir.

Q. You haven't then, any motion in your hand?

A. No, sir.

Q. From your wrist joint down to the end of your fingers?

A. No, sir.

Q. Excepting the thumb, you have some motion in your thumb?

A. Yes.

Q. The palm of your hand, what has become of that?

A. It is partly gone there.

Q. The inside of the palm was injured?

39

A. Yes, sir.

Q. Part of it taken out?

A. Yes, sir.

Q. Have you any feeling in your fingers?

A. I have in those two; this one——

Q. Now, you say in those two, you are referring to the two fingers next to your thumb?

A. Yes, sir.

Q. You have some feeling in those?

A. Yes, sir.

Q. In the third one, what did you say about that?

A. There is no feeling in that.

Q. No feeling in your third finger. Now turn your hand around. The palm of your hand seems to have a kind of a hole in it.

A. Yes, sir.

Q. What caused that?

A. Well, that is caused where it was bursted open, they had to take that flesh away from there.

Q. You can't force these fingers?

A. No, sir.

Q. Where was the thumb injured?

A. It was injured right along in through here, along in there (indicating).

Q. Have you been working since you got hurt at all?

A. No, sir.

Q. What wages were you getting at the time you got hurt?

A. 21½ cents an hour.

Q. How many hours a day?

40 A. Well, I just don't remember that; I think it was eight or nine.

Q. What, if any, pain did you suffer after receiving your injury?

A. Well, I suffered quite a bit afterward, after the reaction set in.

Q. How soon did the pain commence after you got hurt?

A. The next day after I got hurt.

Q. How long did that continue?

A. Well, it continued for six weeks.

Q. And since that time have you suffered any pain with it?

A. Well, I do whenever I hurt the wrist or anything; the wrist won't stand nothing; I can't lift nothing with the wrist.

Cross-examination.

By Mr. Miner:

Q. You said in reply to a question of Mr. Barton's, as I understood you, that at the time you got hurt was the second time you had been working for the St. Louis road.

Mr. Barton: Third time, he said.

Witness: Third time.

Q. That was the third time, was it?

A. Yes, sir.

Q. You had worked for that road twice prior to this time, then?

A. Yes, sir.

Q. And you said in answer to Mr. Barton's question, as I understood you, that that comprised all of your railroad experience; is that correct?

41 A. Yes, sir; for the Minneapolis & St. Louis.

Q. Well, you didn't qualify it by saying Minneapolis & St. Louis, you said that comprised all of your railroad experience, didn't you?

A. Yes, but I meant for the Minneapolis & St. Louis.

Q. Well, you didn't mean that that was the only railroad experience you had?

A. No, sir.

Q. You had worked for some considerable time for the Chicago, Great Western?

A. Yes, sir.

Q. And in what capacity?

A. I was a handy man over there.

Q. What did your work consist of?

A. Boiler work.

Q. In connection with engines?

A. Yes, sir.

Q. That had to do with the front end of a boiler?

A. Yes, sir.

Q. So that during the time that you were thus employed you were around about the front end of the engines a great deal?

A. Yes.

Q. In order to do that work it was necessary for you to get up on the pilot and open the front door at the end of the boiler and get into the boiler, wasn't it?

A. Yes, sir.

Q. So that during the time you were with the Great Western that was the work you were doing?

42 A. Yes, sir.

Q. And during that time you did work on a great many different kinds of engines, didn't you?

A. Yes, sir.

Q. Different sized engines?

A. Yes, sir.

Q. And then you had three experien with the Minneapolis & St. Louis, you worked there three different times?

A. Yes, sir.

Q. And during those times were you working around and about engines?

A. Yes, sir.

Q. So that during all of your railroad experience you had been perfectly familiar with engines?

A. I worked around them lots, yes.

Q. Worked around them every day while you were at work?

A. Yes, sir.

Q. Now, this day in question you were a machinist's helper?

A. Yes, sir.

Q. And you were sent in with this man Conn and this young man Larson to do some work on this engine 159?

A. Yes, sir.

Q. This was in the roundhouse at the time?

A. Yes, sir.

Q. This roundhouse, you say, had fourteen stalls in it?

A. I think it has fourteen, yes.

43 Q. And this engine 159 stood on the track at which end of the roundhouse; as you stand in the roundhouse facing the turntable that is out in front, were you to the left end or the right end?

A. At the right end.

Q. You are wrong about that, aren't you?

A. No, at the right end.

Q. As you stood in the roundhouse looking towards the turntable, the way the engines came in, this engine you were working on was on the second pit on the left hand of the roundhouse?

A. Yes, sir; left hand.

Q. Well, it was the left hand, then, not the right end?

A. No, I thought you said standing outside looking in.

Q. This engine was on the second pit from the left-hand end of the roundhouse as you stood in there looking out towards the turntable?

A. Yes, sir.

Q. Now, I show you here a plan or drawing that represents the left-hand end of that roundhouse. Here is the wall, you see, on the side where I now indicate, the wall nearest towards the shop.

A. Yes, sir.

Q. Towards the annex. Now, as I understand you, this engine 159 was standing upon the second track shown here?

A. Yes, sir.

Q. If this is a representation of that end of the roundhouse, this engine was standing on the second track indicated on this map?

A. Yes, sir.

44 Q. And the front of the engine was towards the rear wall here?

A. Yes, sir.

Q. And the rear of the engine and the tender that you have spoken of was back in this direction that I point?

A. Yes, sir.

Q. To the left as you are looking towards this. Now, here is indicated the pit, what you call the pit. Do you remember there being posts in that roundhouse that held up the roof?

A. Yes, sir.

Q. I call your attention to marks here indicating where those posts are located; on that side, do you recognize that as about the location of the posts?

A. Yes, sir.

Q. Do you recollect where the front end of this engine, where the pilot beam stood, with reference to these posts that are indicated here?

A. Well, I didn't take no particular notice of that.

Q. As we look at this map, the engine was headed in towards this rear wall here?

A. Yes, sir.

Q. So that what you call the right-hand side of the engine would be to the right as you are looking at this map, towards the rear wall there?

A. Yes, sir.

Q. Be over here where I indicate with my pencil. So that would be the point where you were located, on that side?

45 A. Yes, sir; on the right side.

Q. And Larson was over on the other side?

A. Yes, sir.

Q. Now, do you remember anything about this post here as to what its location was with reference to the jack that you were using?

A. Well, I didn't take no particular notice to it.

Q. Was your jack placed so that it was nearer to the wall than that post, or was it back of that post farther from the wall?

A. Well, I think it was back of the post.

Q. Do you mean farther away from the wall or nearer to the wall than the post?

A. Well, I couldn't say as to that.

Q. You don't know, then, as a matter of fact, now, you don't remember whether that jack stood right opposite that post or whether it was a little nearer the wall or a little farther from the wall than the post is?

A. No, sir; I don't remember.

Q. Now, when you went in there that morning the engine was already upon jacks?

A. Yes, sir.

Q. As I understand you, there were four jacks to the rear of the engine, under the frame, and the front of it was raised up and a square timber was placed across the pony truck?

A. Yes, sir.

Q. Now, the front of that engine was controlled by two castings known as the male and female casting; that is true, isn't it?

A. Yes, sir.

Q. Do you recognize this large piece of cast iron on the floor here as constituting the upper casting of that engine?

A. Yes, sir.

Q. That is it, is it?

A. It looks like it.

Mr. Barton: Well, you don't mean to say this is the casting?

Mr. Miner: I mean to say that is the casting of the engine he was working on, from engine 159.

Witness: That looks like the casting.

Q. Well, without regard to whether it was the one or not, it looks like the casting?

A. Yes, sir; looks like it.

Q. It was the male casting. I show you now a photograph marked defendant's Exhibit 2 and ask you if you recognize that as the female truck, or the casting into which this casting fastens when the engine is properly together?

A. Yes, sir.

Q. Now, as I understand you, when you went in there this morning, this front part of the engine, including that iron, or one just like it, was lowered there and a timber placed across there?

A. Yes, sir.

Q. So that the end of the boiler and those parts connected with it rested upon that timber?

A. Yes, sir.

Q. And when you went in there that was the condition the engine was in?

A. Yes, sir.

Q. And you went to work then and did the work you described in bringing this heater up and in loosening the tires on the drive-wheels of this engine and taking the old tires off and then putting the new tires on. Up to that time the engine was standing with four jacks to the rear, and the front part resting upon a square timber lying across this truck; that is true, is it?

A. Yes, sir.

Q. After you got those tires on, then you proceeded to lift up this front part of the engine in order to take this timber out that was lying across that truck?

A. Yes, sir.

Q. And to do that you or this young man Larson went and got a couple of jacks like that jack setting there?

A. Yes, sir.

Q. And you placed one under the right-hand end of the pilot

beam, and Larson placed the other under the left-hand end of the pilot beam?

A. Yes, sir.

Q. And you lifted the front of the engine up above this casting and this timber just enough to loosen that timber?

A. Yes, sir.

Q. Then Mr. Conn told you to let that part down?

A. Yes, sir.

Q. That was for the purpose of letting that part of the casting enter into the round hole into that casting?

48 A. Yes, sir.

Q. When you let it down the edge of that casting there had moved a little to one side, so that it didn't enter into that place, and it rested on this rim that you see around there, the engine wouldn't go into place; that is true, isn't it?

A. Yes, sir.

Q. That showed that the boiler had moved over a little bit to one side so that the castings weren't in alignment; that is true, isn't it?

A. Well, that is what Conn told me.

Q. Well, you knew that there was some reason why they didn't come together, didn't you?

A. Yes, sir.

Q. And then he told you to raise your jack up again?

A. Yes, sir.

Q. And then he went and got a timber and stood one end down on the ground and put the other end up against the side of the engine where you were, and told you to let your jack down, so that the strain against that timber, he thought, would force the front end of the engine over a little bit. You did that, didn't you?

A. Yes, sir.

Q. And when you let it down, the pressure of this timber standing at an angle with one end on the ground and the other end against the steam-chest, didn't push the boiler over so that the castings came together properly, did they?

A. No, sir.

Q. And Conn said you can't do it that way?

49 A. Yes, sir.

Q. Then you say that this jack that you had, just like this, had a square block four inches in thickness lying right on top of it there?

A. Well, I wouldn't say just what size of block it was; that was just my judgment.

Q. Well, this is the third time you have testified in this law suit, isn't it?

A. Yes, sir.

Q. And both times before you said you had a block four inches in thickness, didn't you?

A. Well, we had a block.

Q. Well, you testified before it was four inches in thickness; do you want to change that now?

A. No, sir.

Q. Well, then there was that wooden block lying right down on top of this hydraulic jack?

A. Yes, sir.

Q. And you had let the jack down so that there was a half-inch space between the under side of the block and the pilot beam?

A. The jack was loose, yes.

Q. You had let the jack down so that there was about half an inch of space between the under side of the block and the pilot beam?

A. Yes, sir; it was loose.

Q. And that was the condition it was in when Mr. Conn told you boys to take your jacks to the rear?

A. Yes, sir.

Q. Now, during all this time this was being done Larson was standing there, right there with you people?

50 A. Yes, sir.

Q. He hadn't touched his jack at all?

A. No, sir.

Q. You had raised this jack up, and then Conn told you to let it down, and you did?

A. Yes, sir.

Q. Then he put the other end against the steam chest and then told you to let your jack down again?

A. Yes, sir.

Q. You did that?

A. Yes, sir.

Q. Then he told you to raise the jack up again, and you did that?

A. Yes, sir.

Q. And then he took this timber away; that is true, isn't it?

A. Yes, sir.

Q. And then he told you to let your jack down again?

A. Yes, sir.

Q. And you did. Now, while all that was going on young Larson was standing right there alongside of you?

A. While I was working the one jack; yes, sir.

Q. And you were trying to shove the boiler over, young Larson stood there watching you fellows, didn't he?

A. Well, he was standing there beside us.

Q. He wasn't doing anything, he was standing there?

51 A. I didn't take any particular notice of that.

Q. Well, you knew he was standing there?

A. Yes, sir.

Q. Now, when you got through with that Conn told you to go take your jacks to the rear of the engine?

A. Yes, sir.

Q. And you stood there about five minutes?

A. Stood there a little while.

Q. Well, you testified five minutes before; do you want to change that?

A. No, I don't think it was five minutes, but we stood there a little while after he said that.

Q. Well, the first time you testified you testified it was from five to ten minutes.

A. Well, I don't remember that.

Q. Well, if you did so testify on the first trial, was that true?

A. Well, we didn't stand that long; we stood there a while, I know.

Q. Is your recollection now better than it was the first time you testified on this trial?

A. No, I don't think it is.

Q. No, you would probably have a clearer remembrance the first time you testified than you have now, would you not?

A. I suppose so.

Q. Well, then if you did testify on the first trial that you stood there from five to ten minutes, that was probably correct, wasn't it?

A. Well, I don't know for sure whether it is or not.

52 Q. Well, you stood there some length of time, and then finally you went to work and instead of taking this lever or something else in order to pull that block out, you took your hand and shoved your hand right in on top of that hydraulic jack?

A. Just pushed the block off that way.

Q. Yes, and your hand passed right over the top of that jack?

A. Yes, sir.

Q. And right underneath that pilot beam?

A. Yes, sir.

Q. And you knew if that engine slipped into place that pilot beam would come right down on to your hand, you knew that, didn't you?

A. I didn't know whether it would or not.

Q. You knew if the engine came down it would come right down on your hand if it was on that block?

A. Yes, sir. I didn't know it was coming down.

Q. No, you didn't know it was coming down, but you knew if it did come while your hand was on that jack it would come right down on your hand?

A. Yes, sir.

Q. And yet you put your hand right over that jack?

A. It is always customary.

Q. You could have taken the handle and pushed that block off, couldn't you?

A. I didn't know where the handle was then.

Q. You could have taken your handle and pushed the block off, couldn't you?

A. Well, I suppose so.

53 Q. You could have taken the handle and pushed it away from there without touching the block at all, couldn't you?

A. No, the jack was sunk down in the mud there.

Q. Do you mean to tell this jury there is any mud around there?

A. Well, it is the ground, that is what it is.

Q. The fact of the matter is that after you get to the end of these pits there towards that wall there are ties under those rails just the same as any other track?

A. This wasn't any ties; it was sunk right in the ground.

- Q. There were ties after you get away from those pits, just as any other track?
- A. I suppose so.
- Q. And that ground all around there is hard, isn't it?
- A. Yes, sir.
- Q. So that the surface of that hydraulic jack there is so wide that it couldn't sink between two ties, the ties are so close together?
- A. This was sunk in the ground a little bit.
- Q. How much was it sunk in the ground?
- A. Well, I don't know, I never measured it.
- Q. Why do you say it was sunk in the ground?
- A. Well, because it was sunk down in the ground.
- Q. Why do you say that?
- A. Well, I don't know why I say it.
- 54 Q. Do you mean to tell the jury that the ties there were so wide apart that the bottom of that jack would set between two ties?
- A. I don't know how wide the ties were apart.
- Q. You don't know as to that?
- A. No, I don't know.
- Q. You don't know as to whether those ties are so near together that the bottom of that jack couldn't get between them?
- A. I don't know.
- Q. Do you want to tell this jury that for some reason that base was sunk in such a way that you couldn't pull that away with that block lying on top of there?
- A. No, it was sunk in the ground.
- Q. Well, even if that were true what was the reason you couldn't take hold of the handle and pull that right over?
- A. Well, because it would be awful hard work pulling it around that way.
- Q. With a loose block lying right on top of there?
- A. Yes, sir.
- Q. You had to shove it around anyway?
- A. Yes, sir.
- Q. What is the reason you couldn't do it that way without paying any attention—
- A. Well, there was a bolt down under the pilot beam that bothered me, too.
- Q. Where was that bolt with reference to the top of the jack?
- A. Well, it was right to the front of the jack.
- Q. You mean right between you and the jack as you stood in front of the jack and in front of the engine?
- 55 A. Yes, sir.
- Q. The end of a bolt?
- A. Yes, sir.
- Q. What was that bolt in there for?
- A. Why, it was to hold that handle on, or something there.
- Q. Hold what?
- A. The handle on.
- Q. Hold a handle?

A. Yes, sir.

Q. A handle on the pilot beam?

A. Yes, sir.

Q. What kind of a handle was there on the pilot beam?

A. Well, there is a long piece of iron run clear across the pilot beam.

Q. The whole length of the pilot beam?

A. Yes, sir.

Q. And you say that the bolt that was through that handle was just so situated with reference to the end of the pilot beam that it stuck down in front of this jack when you had it under there?

A. Yes, sir; it was down in front.

Q. So that you had to pull the jack sideways instead of towards you in order to pull it out?

A. Yes, sir.

Q. Well, why couldn't you pull it sideways? There wasn't any thing to interfere with that?

A. Well, I don't know.

Q. Well, was there anything? These gentlemen weren't there and neither was I. You were. Did you see anything that would interfere with it in any way?

A. No, I never saw nothing.

Q. Now, you spoke about the tender; you say that the tender wasn't attached to the engine?

A. Yes, sir.

Q. So that engine stood on this track here that I now indicate the second track from the end, you say there was a space of about ten feet, as you recollect it, between the rear end of the engine and the end of the tank?

A. Yes.

Q. And the tank of the engine and the engine were both inside of the roundhouse?

A. Yes, sir.

Q. What happened just as you got your hand over the top of the jack was that this casting here settled into its place in that casting?

A. Well, I never seen that.

Q. Well, you know that is what happened, don't you, there wasn't any other place that it could go.

A. I suppose it went in there.

Q. Well, you are perfectly satisfied it went in there?

A. Well, I don't know, I never looked at it.

Q. Well, there was no other place that it could go?

A. No, I don't think so.

Q. No, there was no other place that round casting could go except that place there?

A. No.

57 Q. And that is where it went when you had your hand on top of this jack. I understood you to say this morning that you thought there was an engine on the first pit inside of this wall?

A. Yes, sir.

Q. Are you sure about that?

A. Well, I am not positive about it, but I think there was.

Q. Isn't it a fact that there was an engine on the third track and one on the fourth track?

A. Well, I couldn't say as to the fourth.

Q. And no engine on the first track?

A. I couldn't say as to the fourth. I don't remember as to that; I think there was.

Q. Do you remember whether or not there was a big compound engine standing on the track right next to the one you were working on?

A. Yes, I think there was one on that.

Q. One of the large-sized ones?

A. Yes, sir.

Q. One of the superheated or compound. But you don't know whether there was one on the next track beyond that?

A. Well, I think there was.

Q. And you think there was one on the other side right next to the wall?

A. Yes, sir.

Q. So there would be engines, as you recollect it, on all four of those tracks?

A. Would be on all three of them; I didn't see the fourth one.

Q. Oh, then you don't know whether there was an engine standing on the track beyond the big engine?

A. No, sir; I don't know.

Mr. Barton: Counsel have agreed that plaintiff may read the evidence of the witness Larson taken upon the last trial. The evidence commences on page 88. I will start right with the first (reading):

ELMER LARSON, sworn on behalf of plaintiff, testified:

By Mr. Barton:

Q. Where do you live?

A. Marshalltown, Iowa.

Q. How old are you?

A. Eighteen.

Q. When were you eighteen?

A. The 12th day of March, 1912.

Q. This is 1913.

A. 1913, rather.

Q. So you would be nineteen years old this coming March?

A. Yes, sir.

Q. What employment, if any, have you had recently?

A. Working for the Marshall Grocery Company.

Q. That is a grocery company there in Marshalltown, Iowa?

A. Yes, sir.

Q. And what had you been doing before that?

A. I had been working for the M. & St. L.

Q. And where had you been working for them?

A. The last I had was to call the engine crew nights.

Q. When was that? When did you quit that work?

A. The 3d day of July.

Q. This year?

A. Yes, sir.

Q. How long had you been doing that work of calling the engine crew?

A. About three months.

Q. And before that what had you been doing?

A. I had been helping machinist.

Q. For this same company?

A. Yes, sir.

Q. And at this same place in Marshalltown, Iowa?

A. Yes, sir.

Q. How long had you been working in the capacity of helping the machinist?

A. I had been working there about eight or nine months.

Q. And when did you quit the work of machinist's helper?

A. It was either the 3d of April or the 3d of March.

Q. Of this year. You were working as a machinist helper at the time that George Winters was injured?

A. Yes, sir.

Q. You are the young man by the name of Larson that has been referred to by him in this case, then?

60 A. Yes, sir.

Q. And what is your recollection about the time of day that you first went into the roundhouse to work on engine 159?

A. It was about 7:30 in the morning.

Q. And when did you first learn that you had to do any work on that engine that day?

A. It was at the same time, at 7:30.

Q. Had you started to work before you learned that you were to go into the roundhouse to work on engine 159?

A. No, sir.

Q. And how did you learn that you were to go to the roundhouse?

A. The machinist told us.

Q. What machinist?

A. Machinist Conn.

Q. Now, had you been working with Conn before that time?

A. Yes, sir.

Q. And what building did you do your work in before this day, as a usual thing?

A. The back shop.

Q. And had you worked all the time with Conn?

A. No, sir.

Q. Had you done any work with Winters before this day?

A. Yes, sir.

Q. Did anyone else go with you and Conn and Winters into the roundhouse?

A. No, sir.

61 Q. What was the first work you did in the roundhouse when you got there?

A. We got the gasoline heater.

Q. You took off the old tire and put on the new ones?

A. Yes, sir.

Q. And what time did you get through with that work?

A. I don't remember what time we did get through with it.

Q. Well, it was in the afternoon, was it?

A. That is with all of it?

Q. Yes.

A. Yes, it was in the afternoon some time.

Q. Now, after you got the new tire on, what was the first thing done after that?

A. Why, to let the engine down.

Q. And who gave the orders?

A. Conn, the machinist.

Q. Well, now, when he gave the order to let the engine down what did you do?

A. I went to get a jack.

Q. And did you get a jack?

A. Yes, sir.

Q. And what did you do with it?

A. Put it under the pilot beam on the left-hand side of the engine.

Q. And did you notice what George was doing at that time?

A. No, sir.

Q. Did you get a jack that looked like this one here in court?

A. Yes, sir.

62 Q. Well, after you put it under the left-hand side of the pilot beam what did you do then?

A. Jacked it up.

Q. That is, you raised the jack?

A. Yes, sir.

Q. Or the head of the jack. How close to the end of the pilot beam was it as you placed your jack?

A. I don't know exactly how close it was to the end.

Mr. Barton: Then there is reference to the photographs which we haven't got here this time. I will leave it out.

Q. Now, I call your attention to defendant's Exhibit 1, the timber that projects out on each side of the front end of this photograph; what do you call that?

A. The pilot beam.

Q. Now, whereabouts with reference to the end of that pilot beam did you set this jack when you commenced to jack up? That is, about how close to the end?

A. That I don't know; I can't recollect.

Q. Do you recollect how far from the rail the jack set? If you don't know, say so.

A. No, sir; I don't.

Q. How much did you jack up when you worked your jack?

A. I jacked it up high enough to take the weight off of the block that was there.

- Q. What kind of a block do you refer to? What was that block like?
- 63 A. The beam that was across from the engine trucks to hold the weight of the boiler up.
- Q. Was it in front or behind the pilot beam?
- A. It was behind the pilot beam.
- Q. And when you so jacked up your jack did George jack up on his side also?
- A. Yes, sir.
- Q. Now, when you got it jacked up what did you do then?
- A. We took the beam out.
- Q. Do you recall which side you took that out, to your side or George's side?
- A. It was to my side.
- Q. After you got out that piece of timber what was said or done then?
- A. We let the engine down.
- Q. Who said that?
- A. The machinist.
- Q. That is, you are referring to Conn now?
- A. Yes, sir.
- Q. And what did you do then?
- A. I let my jack down.
- Q. And what happened then or what took place then?
- A. He said that the engine never lined up.
- Q. How's that?
- A. He told us the engine never lined up.
- Q. Who told you that?
- A. Conn.
- Q. And what else, if anything, did he say?
- A. That we should jack it up again.
- Q. And did you?
- 64 A. Yes, sir.
- Q. What took place then after you jacked it up the second time?
- A. Why, he had Mr. Winters let his jack down to use if he could throw it over.
- Q. You said he had Winters let his down?
- A. Yes, sir.
- Q. Did you hear what he said about that? What Conn said about that?
- A. No, sir.
- Q. Well, did Winters leave his down then?
- A. Yes, sir.
- Q. And then what was done, if anything?
- A. He jacked it up again.
- Q. That is, Winters jacked his up again then after that?
- A. Yes.
- Q. Did you hear Conn say anything at that time?
- A. No, sir.

Q. Well, now, after George jacked up his jack the last time what was done then?

A. He put the block against the cylinder.

Q. Who did that?

A. Conn.

Q. And where were you when he was doing that?

A. I was standing in front of the engine.

Q. And after Conn had put the block against the cylinder what was done then?

A. Winters let his jack down.

Q. And why did he leave it down, did Conn say anything about it?

A. I don't know whether he was under order or not.

Q. On which side of the engine was this block put against the cylinder?

A. On the right-hand side.

Q. And that is the side that George Winters was working on?

A. Yes, sir.

Q. Did George leave his jack down after this block had been put against the cylinder?

A. Yes, sir.

Q. And then what was done?

A. He said that he couldn't do it that way.

Q. Who said that?

A. Conn.

Q. And then what?

A. And then he was talking to the foreman, and then he told us to take jacks to the rear of the engine.

Q. Who was talking to the foreman?

A. Conn.

Q. That is the foreman of the roundhouse?

A. No, he was talking to the foreman of the back shop.

Q. What was his name?

A. Winter.

Q. Did you hear what the talk was?

A. No, sir.

Q. Well, then what was done when Conn said take your jacks to the rear?

66 A. I started over toward my jack, and just as I got there reaching for my jack the engine came down.

Q. And is that the time that George got caught?

A. Yes, sir.

Q. Had you done anything with your jack before the engine came down? I mean now, after you had been told to take your jack to the rear. You say you started and walked over to your jack after Conn said take your jack to the rear?

A. Yes, sir.

Q. What I am inquiring about is as to whether you got your jack and done anything with it before the engine came down.

A. No, sir.

Q. What position was your jack in when you left it and walked around in front of the engine?

A. It was straight up and down.

Q. Well, was the top of it against the pilot beam or not?

A. Yes, sir.

Q. What was the last thing that you had done with your jack before this accident?

A. We jacked it up.

Q. And the head of the jack was against the bottom part of the pilot beam at that time?

A. Yes, sir.

Q. Was the weight of the engine resting on the jack at that time?

A. Yes, sir.

Q. After you had jacked up your jack the last time had you done anything with it after that, with the jack, in any way, until
67 the engine came down and caught George's hand?

A. No, sir.

Q. Now, what kind of a lever were you using on your jack?

A. An open-ended wrench.

Mr. Barton: Now, if the court please, plaintiff served notice on the counsel to produce the instruments, the two levers and the jack, and these are what you have brought in in answer to that notice, and this is what you call an open-end wrench?

Mr. Miner: You directed us to produce the open-ended wrench, the lever and the jack produced on the last trial, and we did so. That open-ended wrench is the one you furnished.

Mr. Barton: I think if you will look at the notice it says the one he used at the time of the accident.

Mr. Miner: We have produced the ones used at the other trial.

Mr. Barton: Very well.

Q. You were not using, then, the lever that I hold in my hand which is in evidence here that has the lug on the one side?

A. No, sir.

Mr. Barton: Then there are some statements by counsel and the court; I suppose that doesn't cut any figure here.

Q. The witness is shown Exhibit C; is that like the open-end wrench that you were using on your jack?

A. Yes, sir.

68 Q. Do you notice any difference between this Exhibit C that you are looking at and the wrench you were using at the time just prior to the time of the plaintiff's injury?

A. No, sir.

Q. Then do we understand that so far as you observe this is like the one that you did use?

A. Yes, sir.

Q. Now, in using that Exhibit C, which you describe as an open-end wrench, what part of it did you insert in the jack?

A. This part over here.

Q. The small end?

A. Yes, sir.

Q. In other words, the end that hasn't the open part in it?

A. Yes, sir.

Q. And you inserted, then, the handle end in the place where I now insert it in the jack?

A. Yes, sir.

Q. Is that the only place that you could insert a lever to work this jack?

A. Yes, sir.

Q. What did you do with the wrench which you were using as a lever on this jack the last time that you did use it in the jack before plaintiff got hurt?

A. I left it in the jack.

Q. You left it with the handle end inserted in the open place for the use of it?

A. Yes, sir.

Q. Something like the position it is in now or not?

69 A. I don't know the exact position of it now.

Q. Do you know how far it was entered into the slot arrangement where you had inserted it for the purpose of operating the jack?

A. No, sir.

Q. Do you know how far you could insert it into that place, the one you were using on that particular jack?

A. No, sir.

Q. Then do I understand that when you finished jacking up the last time and walked around in front of the engine, the open-end wrench which you had been using as a lever was in the jack?

A. Yes, sir.

Q. And when Conn told you to take your jacks to the rear and you walked back towards your jack, this open-end wrench was still in the jack?

A. Yes, sir.

Q. Did you get to it to take hold of it at all, or did you take hold of it at all before the engine came down and Winters' hand was caught?

A. No, sir.

Q. What is your recollection about the rear end of the engine as to what it rested on during the time that you were taking off the old tire and putting on the new ones?

A. It was resting on four screw jacks.

Q. And what is your recollection as to where those screw jacks were placed?

A. There was two on each end, two on each side of the back.

Q. And under what part of the engine were they placed?

70 A. Under the cab part.

Q. Is it a timber or a piece of metal that forms the rear part of the engine?

A. It is a piece of metal.

Q. Does that run from one side to the other like the pilot beam itself?

A. Yes, sir.

Q. And you say two of the screw jacks were at the one side under that piece of casting and two at the other side of it?

A. Yes, sir.

Q. Were they in line across the rear end of the engine?

A. Yes, sir.

Q. I suppose both were placed, however, outside of the rail—or not?

A. No.

Q. Oh, they were inside of the rail, one of them?

A. Yes, there was two of them inside of the rail.

Q. And two outside?

A. I don't know whether two outside or they were right on the rail.

Q. You say you don't know?

A. I don't know.

Q. But the four jacks were placed under that casting at the rear end and in line across under the cab of the engine?

A. Yes, sir.

Q. After you removed that timber that was under the front part of the engine what did the engine rest on?

71 A. It rested on them jacks.

Q. What jacks?

A. The jack on the left side in front and the four in back.

Q. Had you ever helped before this day in the taking off of old tires on locomotive engine driving wheels and putting on new ones?

A. I have when the wheels were out from under the engines.

Q. This day, then, of the accident was the first time that you had ever done that kind of work with the engine jacked up and the wheels on the engine?

A. Yes, sir.

Q. What, if any, instructions were given you that day or at any time prior to that day about how to do that kind of work? I mean the work of taking off the tire and putting them on and jacking up each side of the engine where the wheels were on. In other words, did anyone ever tell you anything about what to do except what Conn told you there that day?

A. That is all.

Q. And did Conn tell you anything else than what you have told here, simply that he would tell you what to do as you were going along? Did he say anything else to you?

A. No, sir.

Q. Did he give you any instructions at all about how to use the lever?

A. Yes, sir.

Q. What did he tell you about that?

72 A. He told me that I didn't know how to jack.

Q. How's that?

A. He told me that I didn't know how to jack.

Q. How did he happen to tell you that?

A. I was pumping my jack up, it was working hard on me, and

he would slip over once in a while, and he came over and worked it and got it up for me.

Q. When did that take place? What time of the day?

A. That is when we first put the jacks under.

Q. In the morning?

A. No, when we were letting the engine down.

Q. Oh, I see. The engine had been raised up before you went to work that day?

A. Yes, sir.

Q. You hadn't anything to do with the raising of the engine?

A. No, sir.

Q. So that the first work you did with any jack that day on this engine was after you had finished putting on the tire?

A. Yes, sir.

Q. Before George got hurt that day had you done anything at all with the screw jacks that were under the cab end of the engine?

A. No, sir.

Q. And the first thing that you did with the hydraulic jack that day was after you had put the tire on?

A. Yes, sir.

73 Q. And when you were jacking it up after having placed the jack under the end of the pilot beam, do I understand you that you had some trouble with it?

A. Yes, sir.

Q. What was the trouble?

A. It worked hard, it slipped on me.

Q. What do you mean by slipping on you?

A. Well, it went down every once in a while.

Q. You were trying to work it up and in place of its going up it would go down?

A. It would go down.

Q. And what took place then, what was said and done then?

A. He told me that I didn't know how to work it.

Q. Who told you that?

A. Mr. Conn.

Q. How did he happen to say that to you?

A. Well, he seen me having trouble with it.

Q. And what did he do after telling you that you didn't know how to work it?

A. He came and jacked it up.

Q. And did he finish jacking it up entirely?

A. Yes, sir.

Q. So you didn't do any more then at that time in the jacking-up business?

A. No, sir.

Q. Now, is that all that Conn said to you that day about how to use or work this jack?

A. Yes, sir.

Q. And all that he said was simply that you didn't know how to do it?

74 A. Yes, sir.

Q. Did he tell you how to do it?

A. Yes.

Q. What did he say?

A. He told me that I pushed down too far on the wrench and tripped it.

Q. Now, did Conn use the same handle, this open-end wrench, for a lever that you were using?

A. Yes, sir.

Q. What, if anything, did Conn say about the question of leaving your lever or this wrench in the jack when you were not using it?

A. He never said a thing.

Q. Where did you get that lever?

A. I don't know just where I did find it.

Q. After you got the tire on you say you got this jack. Did Conn say anything to you about getting it, tell you where to get it or what to do?

A. No, sir, he told us to get the jacks.

Q. He told you to get the jack, but did he say anything about as to where you were to get them?

A. No, sir.

Q. And did he say anything about the lever that you were to get or the kind of lever that you were to use?

A. No, sir.

Q. So you simply went and hunted for a jack yourself?

A. Yes, sir.

Q. And hunted for a lever?

A. Yes, sir.

Q. Do you know whether you got the lever at the same place that you got the jack?

75 A. No, sir, I don't remember.

Q. Did anyone help you get the jack and the lever?

A. No, sir.

Q. Did you notice the fact that George had a different kind of lever from what you had?

A. Yes, sir.

Q. You had noticed that?

A. Yes, sir.

Cross-examination.

By Mr. Miner:

Q. How long had you been around those shops at this time?

A. One month lacking two days.

Q. At the time that George was injured?

A. Yes, sir.

Q. You had been there one month lacking two days?

A. Yes, sir.

Q. Is that all you had ever been around there?

A. Yes, sir.

Q. That comprised all the time that you had ever been in and around those shops, did it?

A. Yes, sir.

Q. During that month or a little more you was in there every day?

A. Yes, sir.

Q. You saw these jacks around there during the time you were there?

A. Yes, sir.

Q. You knew how they were operated?

76 A. Yes, sir.

Q. You worked the handle there to raise the jack up?

A. Yes, sir.

Q. You knew the manner in which the jack was let down?

A. Yes, sir.

Q. You had seen that done a great many times?

A. Not so many times.

Q. Well, you had seen it done, you knew what the operation was?

A. Yes, sir.

Q. Now, when you were sent in there with Mr. Conn this day, the first thing you did was what?

A. To get the gasoline heater.

Q. You and Winters went and got that together?

A. Yes, sir.

Q. Brought it around where the work was to be done?

A. Yes, sir.

Q. You knew what that was for?

A. Yes, sir.

Q. You had seen it used a good many times?

A. Yes, sir.

Q. Knew how it was to be used?

A. Yes, sir.

Q. And after you got it around there, why, you helped in the work of taking the tires off from the driving wheels?

A. Yes, sir.

77 Q. And helped in the work of putting the other tires on to the driving wheels?

A. Yes, sir.

Q. When you got there the engine had been raised up by some other crew preparatory to taking these tires off?

A. Yes, sir.

Q. So you didn't have to do that work, and that had already been prepared for you?

A. Yes, sir.

Q. After the tires were on then you knew that the engine had got to be lowered down and let down so that the drivers would stand on the track?

A. Yes, sir.

Q. In order that the engine might be moved out?

A. Yes, sir.

Q. Now, the front of the engine rested on a piece of timber that was put across under the boiler over the pony truck?

A. Yes, sir.

Q. And after you got these tires on to these driving wheels, why, your next work was to take that timber out of there?

A. Yes, sir.

Q. That was taken out of there for the purpose of letting the boiler part of the engine settle down into its proper place?

A. Yes, sir.

Q. And the foreman told you to go and get these jacks for the purpose of raising up the front end in order to get that timber out from under the pony truck?

A. Yes, sir.

78 Q. And you went and got one jack and Winters went and got a jack?

A. Yes, sir.

Q. And you brought your jack and you put it under the left end of this pilot beam?

A. Yes, sir.

Q. And then raised it up?

A. Yes, sir.

Q. Did you have any block on top of your jack?

A. I can't remember whether I had or not.

Q. Don't you remember that you had a block of wood on top of the jack?

A. I can't remember that I did.

Q. And the jack stood on the ends of the ties?

Mr. Barton: That wasn't answered.

Q. The rails that the engine stood on were on ties, were they not?

A. I couldn't see any ties.

Q. What did the rails rest on?

A. I couldn't see what they were. It was dirt all over. If there was any ties, there was dirt on them, you couldn't see the ties.

Q. Well, what did your jack stand on?

A. I can't remember whether I had a block under it or not.

Q. You can't remember whether you had a block on top or not?

A. No, sir.

Q. But you got it under the end of the pilot beam on the left-hand side?

A. Yes, sir.

79 Q. And Winters got another one on the end of the pilot beam on the right-hand side?

A. Yes, sir.

Q. And you raised up the front of the locomotive far enough to take that timber out that was across the pony truck?

A. Yes, sir.

Q. And after you got that out, why, then the boiler didn't go into the position that it ought to occupy?

A. No, sir.

Q. And you were engaged in the work of trying to get that to go into place?

A. Yes, sir.

Q. You knew that the difficulty was because the mail casting under the front of the boiler had slipped a little to one side so that it wouldn't enter into the casting below?

A. Yes, sir.

Q. And you knew the work that was being done was for the purpose of trying to crowd the boiler over toward the side that your jack was on, so that those two castings would come together properly?

A. Yes, sir.

Q. Now, you say that the front of the locomotive was raised upon these two jacks after the timber had been taken out from over the pony trucks?

A. Yes, sir.

Q. Now, if one of those jacks was let down, then the front end of the locomotive would rest on this casting here, on whatever the end of that was on below, on this jack over here, wouldn't it?

A. Yes, sir.

80 Q. Those two would be the points of bearing that would hold that up, that boiler, this point here resting on the side of the casting below, and this point out here that I indicate, the end of the beam, where your jack was?

A. Yes, sir.

Q. And if in the effort to push this boiler over, if the boiler swung over far enough so that casting reached its proper place and slipped into that hole there, why, then that would cause that side of the engine to come down, wouldn't it, the right-hand side, where Winters—

A. I don't know.

Q. What?

A. I don't know.

Q. If the boiler was resting on that casting and on this jack over here, and that casting slid into the hole below there so that it settled down into place, it couldn't do that without bringing this end of the beam down, could it?

A. No, sir.

Q. And what you mean by the boiler coming down is that after Conn had told you boys to take these jacks to the rear—Winters had already let his jack down, hadn't he, while you were standing there beside him?

A. Yes, sir.

Q. So that his jack wasn't supporting this end, the right-hand end, of this beam?

A. No, sir.

81 Q. It was down. And before you got over there and before you had touched your jack at all, this male casting settled into this casting below, that is what you mean by the engine settling down, isn't it?

A. Yes, sir.

Q. And when it did that, why, this corner dropped down; that is, the corner where Winters' jack was; that is true, isn't it?

A. Yes, sir.

Q. Now, when Conn gave the direction to you boys to take those jacks to the rear of the engine, then he went back to the rear of the engine himself, didn't he?

A. I don't know where he was at.

Q. Well, he left there where he was at the time that he gave you the direction, didn't he?

A. Yes, sir.

Q. You continued to stand right there beside Winters for several minutes after the order was given, didn't you?

A. No, sir.

Q. What?

A. No, sir.

Q. Didn't you stand there beside Mr. Winters for five minutes or more after that order was given?

A. No, sir.

Q. Do you mean to say that as soon as Mr. Conn gave that direction that you left your position here beside Mr. Winters and started around to the other side of the engine?

A. Yes, sir.

Q. When you got over there your jack was right up tight under the frame, wasn't it?

82 A. Yes, sir.

Q. Just as you left it?

A. Yes, sir.

Q. It hadn't gone down at all?

A. Not to my knowledge.

Q. It was still standing right up under that beam?

A. Yes, sir.

Q. And the end of the beam was resting on it?

A. Yes, sir.

Q. And before you touched it in any way, with the jack standing there just as you left it, tight up to the end of the beam, the boiler settled into place and caught Mr. Winters' hand on top of the jack?

A. Yes, sir.

Q. Now, do you know whether this wrench that is shown here is the same weight as the one that you had or not?

A. No, sir.

Q. Do you know whether or not that handle there is the same thickness and the same wrench that you had or not?

A. No, sir.

Q. Do you know whether that is of the same length as the wrench that you were using or not?

A. No, sir.

Q. Do you know how far the wrench that you were using could be put through the contrivance on the side of the jack there by which you raise and lower it?

A. No, sir.

83 Q. You knew, did you not, that it was an impossibility for one of those jacks to go down unless the handle was lowered down so far that it would allow it to trip?

A. Yes, sir.

Q. As long as the handle remained above a certain point it was impossible for the jack to go down?

A. Yes, sir.

Q. When did you first remember after this occurrence of Mr.

Winters' getting hurt that it was an open-ended wrench that you were using in operating that jack instead of the handle that usually is used in that way?

A. I knew it all the time.

Q. You knew it all the time?

A. Yes, sir.

Q. You made a statement about what occurred there at that time, did you not?

A. Yes, sir.

Q. I show you now a document that was marked defendant's Exhibit 2 in the other trial; I show you a document that is marked defendant's Exhibit 4, one part of which is in typewriting with the name Elmer Larson signed in writing, and then one part is in long-hand with the name also signed, and ask you if those are your signatures attached there?

A. Yes, sir.

Q. You signed the paper in the two places indicated, did you?

A. Yes, sir.

84 Q. Now, at the time that you made this statement you spoke about using the handle, did you not?

A. Yes, sir.

Q. You didn't say anything about using the open-ended wrench?

A. No, sir.

Q. Well, did you recollect at the time that you gave this statement that you had used an open-ended wrench?

A. Yes, sir.

Q. Well, why didn't you speak about it at the time that you gave your statement?

A. As long as you got an open-ended wrench using in a jack we call it a handle, just the same as you would a handle.

Q. You don't distinguish at all between the two then?

A. No, sir.

Q. Any contrivance that you used for the purpose of pumping that up and down, why, you call it a handle?

A. Yes, sir.

Redirect examination.

By Mr. Barton:

Q. When you were on the right-hand side close to Winters and Conn, and after George had left his jack down and Conn had told you to take the jacks out and take them to the rear, did you know whether the castings under the front part of the engine were resting upon each other or not?

A. No, I never noticed.

85 Recross-examination.

By Mr. Miner:

Q. You knew that the front of the boiler at that time hadn't settled into its proper place?

A. Yes, sir.

Q. Now, after the last time that you raised your jack up under the end of the pilot timber, then you left there and walked around on to Mr. Winters' side of the engine?

A. Yes, sir.

Q. And Mr. Conn got this piece of timber that has been spoken of and put it up against the cylinder?

A. Yes, sir.

Q. And then Mr. Winters let his jack down for the purpose of attempting to force the boiler over to the left so that those castings would come together properly; that is true, isn't it?

A. Yes, sir.

Q. And after he had got the timber and braced it against the steamchest, and Mr. Winters had let his jack down, then it appeared that that apparently hadn't forced the boiler over so that the casting came together properly?

A. No, sir.

Q. And then Mr. Conn said that you couldn't do it in that way, didn't he?

A. Yes, sir.

Q. And then he removed the timber, that is, he had Mr. Winters raise his jack up again; that is correct, isn't it?

A. I can't recollect how many times he did raise it up and pull it down.

Q. No, I am not asking you that. I say after the timber had been placed up in the slanting position against the steam chest and Mr. Winters let the jack down, then Mr. Conn said it couldn't be done in that way?

A. Yes, sir.

Q. And then Mr. Winters raised the jack up again and Mr. Conn took the timber away, didn't he?

A. Yes, sir.

Q. And during all that time you were standing there observing what was going on?

A. Yes, sir.

Q. That was after you had raised your jack up and gone over there and left it?

A. Yes, sir.

Q. All that took place before Mr. Conn said to you boys to take your jacks down to take them to the rear of the engine?

A. Yes, sir.

Q. And then you went back as you have described?

A. Yes, sir.

Defendant's Exhibits 1 and 2, and the castings referred to as the male and female castings, were introduced in evidence without objection.

JOSEPH LANG, sworn on behalf of plaintiff, testified:

By Mr. Barton:

Q. Where do you live, Mr. Lang?

A. Marshalltown, Iowa.

Q. How old are you?

A. Forty-nine.

Q. Have you been working for the Minneapolis & St. Louis Railroad Company?

A. Yes, sir.

Q. How long have you been working for them?

A. I worked for them ever since they got charge of it down there.

Q. Ever since they—

A. They took charge of it.

Q. Oh. When was that, how long ago?

A. Oh, it must be over two years.

Q. You had been working for the Iowa Central before that?

A. Seven years.

Q. And the Minneapolis & St. Louis took over the shops there?

A. Yes, sir.

Q. What position did you hold? What was your work?

A. Machinist helper.

Q. Were you working there in the roundhouse the day that George Winters got hurt?

A. Yes, sir.

Q. What machinist were you helping?

A. A fellow by the name of Hoppe.

Q. Now, where was the engine that you were working on?

A. The next west of the engine on which George Winters was.

Q. The next west?

A. West.

Q. Of the one that Winters was working on?

A. No, not west—east. East of it.

Q. Next east?

A. East.

Q. That would be the third track, then, from the—

A. From the partition.

Q. From the west end?

A. Yes.

Q. That is right, ain't it?

A. That is right.

Q. What is your recollection as to whether there was any engine on the first track at the west?

A. Well, I couldn't say, I ain't sure.

Q. Had you been working there on that engine with Hoppe all day?

A. Yes.

Q. Had you noticed George Winters working about the other engine on the second track?

A. Yes.

Q. What were you doing at the time Winters got hurt?

A. Just at the time I wasn't doing anything.

Q. Just come down this way. (Witness steps down before jury.)

Q. Now, which is east and which is west, so far as these tracks here are concerned? (Referring to defendant's Exhibit 1.)

A. The shop is over here and the annex is right there (indicating).

Q. This would be the west side, then?

A. Yes.

89 Q. So understanding it, then, that that end next to you where the W is is the west side and the shop side—

A. Yes.

Q. —your engine that you were working on was on the third one of these tracks counting from that side?

A. Yes.

Q. George Winters was working upon the engine on the second track from the west; is that right?

A. Yes.

Q. Now, just at the time he got hurt were you doing anything at all?

A. No.

Q. Where were you at that time?

A. I was sitting on the plank that we placed across the pit, that we call a pit plank. We saw off just a fitting between the two rails we call a pit plank.

Q. Now, whereabouts was that plank with reference to the ends of the engine that you were working with, near the middle or the front end or near the back end?

A. It was pretty well ahead; it wasn't in the center, but more to the front.

Q. Of the engine. That is, it would be nearer to the wall that the engine was headed against?

A. Yes, sir.

Q. Then you were sitting somewhat under your engine?

A. Under my engine, yes.

90 Q. What was your engine resting upon—the wheels, or had it been raised up?

A. We had two jacks under it, but we had blocks there, too; we had a block there, too.

Q. Were the wheels on your engine or off,

A. The wheels wasn't off, only the front truck we had out, pushed ahead, ahead of the engine.

Q. And the driving wheels, were they on or off?

A. They was on the rails.

Q. Now, were you sitting in front, then, of the driving-wheels?

A. Well, yes, I was sitting between the front drivers and the engine truck, but the engine truck was ahead of us, ahead of the engine.

Q. As you were sitting there which way were you facing?

A. I was facing towards the engine where they was working on.

Q. That is, towards the engine that Winters was working on?

A. Yes.

Q. And as you sat there then looking towards the engine that Winters was working at you would be looking at which side of his engine, the right side or the left side?

A. I couldn't look on the right side of the engine, because I couldn't see through.

Q. No. That is, the right side of Winters' engine was next to you?

A. The right side of Winters' engine was off of me.

Q. How's that?

91 A. No, that was on the other side; I couldn't see the right side of his engine.

Q. Oh, you were looking at the left side of his engine?

A. At the left side.

Q. That is, Winters' engine was to the west of your engine?

A. Yes.

Q. And you were looking—

A. I was looking west on his engine, on the right side, is all I could see, his engine the right side, but not the left side—the left side I could see, but not the right side.

Q. In other words, you could see the fireman's side, which is the left side of the engine?

A. Yes.

Q. And not the right side, which is the engineer's side?

A. Yes.

Q. From where you were sitting could you see George Winters at all?

A. I could see him only up to his shoulders. Of course, I was sitting down, and the engine was high enough, all I could see him walk around, but that is all.

Q. You could see under Winters' engine and see him on the other side?

A. Well, no, I couldn't. Of course, I could see him once in a while, but not all the time.

Q. Before the accident had you noticed that they were using hydraulic jacks under the front end of their engine; the Winters engine?

92 A. Yes.

Q. Now, as you sat there under your engine could you see the jack on the left-hand side of the Winters engine?

A. Yes.

Q. Did you see it?

A. Yes.

Q. What was the first thing that attracted your attention to anything going wrong with the Winters engine, that is, as to Winters being hurt?

A. After Winters was hurt?

Q. What happened when he did get hurt?

A. Oh. I kept looking out there, and when the engine dropped I seen that jack was down on the left side, that jack was down with that wrench in there. I jumped out then, run up on the left side of his engine, and I seen that he was fastened, his hand, and that is all,

I paid any attention to it. Then I just run away about pretty near in the center of the roundhouse to where his old man worked under an engine down in the pit, he was under an engine, and I told him that his boy got hurt, to hurry up and go down there.

Q. Did you notice whether there was any lever in that jack on the left-hand side of the Winters engine?

A. Yes, wrench.

Q. How's that?

A. The wrench was in there.

Q. The wrench was in there?

A. Yes.

Q. And by a wrench do you mean an instrument like this
93 that I hold in my hand?

A. Yes, just about like that.

Q. Is it what you call an open-end wrench?

A. An open-end wrench.

Q. Now, I guess we better have this marked as an exhibit so we will know what we are referring to. It will be plaintiff's Exhibit A, then, that I have been referring to. Had you been giving any special attention to Winters and the people that were working with him about that engine before the accident?

A. Well, yes, I looked out a good deal.

Q. Speak loud, please.

A. I watched them a while, and I said to my machinist, to Hoppe, "I am afraid somebody's going to get hurt there."

Mr. Miner: Well, now, wait a minute. If the court please, I object to that and move to strike it out as improper.

Mr. Barton: That part of it we consent to be stricken out.

The Court: Yes, strike it out, what he said to the machinist.

Q. Now, you have said you noticed that the jack on the left-hand side of the engine that Winters was working on went down; did you notice that before or after you got out of the pit?

A. I didn't see the jack just going down; I didn't see it going down.

Q. Well, when was it that you saw it down, then?

A. When she fell. When she fell, then I looked at the
94 jack, and the jack was down, and I jumped out.

Q. Now, did you notice the Larson boy there at that time?

A. After the engine fell the Larson boy was at the head of that engine, was in front of the engine.

Q. Was there anyone by the side of the jack on the left-hand side at the time the engine fell?

A. No, nobody.

Cross-examination.

By Mr. Miner:

Q. What do you mean by saying that the engine fell?

A. Well, the noise it made, it fell.

Q. What do you mean by saying that the engine fell? Just tell this jury what you mean by that statement?

A. Well, I mean that the engine fell.

Q. Speak up so they can hear.

A. Because it fell, it jarred, it even jarred the whole shack, the roundhouse.

Q. Well, what do you mean by saying that it fell? What happened?

A. Well, she fell.

Q. Well, fell where?

A. Went into the place.

Q. Oh, then you mean those two castings came together as they ought to?

A. Yes.

Q. That is what you mean when you say the engine fell?

A. There is where she fell in.

95 Q. Then the engine simply came together the way it ought to come together?

A. Yes, it must.

Q. You have quite a good deal of interest in this lawsuit, haven't you?

A. No, I haven't got any interest in anything.

Q. You haven't got any interest in anything?

A. No.

Q. You know this is the third time this lawsuit has been tried?

A. I don't.

Q. You don't?

A. Don't know that is the third time.

Q. Didn't you know this case had been tried before?

A. Yes, I know that.

Q. You didn't appear as a witness that time, did you?

A. No.

Q. This is your first appearance?

A. Yes, sir.

Q. How does it happen that you are here now and wasn't here before?

A. Well, that must have happened because we had been talking down there; through my machinist, I guess it come out, that we seen it.

Q. Oh, well, when did it come out that you saw it?

A. Oh, I don't know. It must be about four months ago.

Q. About four months ago?

A. Yes, or more.

96 Q. Long after the accident happened, long after the lawsuit had been tried?

A. Yes.

Q. Then you got very busy talking about it?

A. Well, I wasn't busy; I never said a word.

Q. Well, how did anybody guess that you knew anything about it, then?

A. I and Mr. Winters and Hoppe we was standing together and

talking about this case, that is, Hoppe and Mr. Winters was talking, I wasn't saying anything, and Mr. Winters—Hoppe, I should say, he asked Mr. Winters about the case, if he ever got any money out of it yet, and Mr. Winters says no, and Mr. Hoppe says, "It's funny," he says, "that he wouldn't get anything, as bad as his hand is crippled up, I and Joe seen it, we seen it, Joe especially, he was sitting there and seen it."

Q. Speak louder, we all want to hear you.

A. He pointed over to me, Hoppe did, he says, "Ain't it, Joe, didn't you seen it?" Well, I couldn't say nothing but yes,—which I said.

Q. Hoppe gave you away then?

A. Well, he must, because I never said anything.

Q. So Hoppe is the fellow?

A. I never mentioned it.

Q. You never said anything about it?

A. No. Nobody ever said anything to me.

Q. No; you were very close-mouthed about it, Hoppe happened to give you away?

A. He must.

97 Q. Yes. Now, do you know the length of that pit in that third track that you say this engine you was working on was standing on?

A. No, I didn't.

Q. You don't know the length of it. You have worked there how many years?

A. Well, I worked about five years in the round house.

Q. You don't know the length of it. You have worked there how many years?

A. Well, I worked about five years in the round-house.

Q. About five years in the roundhouse?

A. Yes, sir.

Q. And yet you can't tell the jury the length of the pit?

A. No, we never measured it.

Q. But you have seen those a hundred times at least?

A. Yes.

Q. And you haven't any judgment as to how long that pit is?

A. No, I don't.

Q. No, you aren't very observing about some things, are you?

A. I wouldn't say unless I am sure of it.

Q. No, you aren't very observing about some things, are you?

A. Nothing like that.

Q. No, nothing like that interests you at all. You have been around that pit and working in those pits day after day, and yet you haven't any opinion as to the length of them?

98 A. No.

Q. You never observed closely enough to be able to tell this jury in your opinion how long those pits are?

A. No, I don't.

Q. No. Now, this engine that you were working on, its smoke-stack came under the hood that was prepared there?

A. I couldn't say that, I never paid any attention.

Q. You couldn't tell that?

A. No.

Q. How did that engine stand with reference to the posts that stand out from the wall along there, between those tracks; was the front of the engine as far forward as those posts?

A. The front; well, yes.

Q. The front of the engine?

A. The front post, it was just about even with the pilot.

Q. These posts that are indicated on this drawing, then, were just about even with the pilot of the engine that you was working on?

A. Yes, sir.

Q. How many drive-wheels did that engine have?

A. Two on each side.

Q. And where were those drive-wheels standing with reference to the pit?

A. I don't understand that.

Q. You say the drive-wheels stood on the rails?

A. Yes.

99 Q. Now, did the engine stand so that those drive-wheels were over the pit, or were they to the south of the pit or to the north of the pit?

A. Well, they was over the pit.

Q. They were over the pit?

A. Like they always are.

Q. How near to the front of the pit did the front drive-wheels on your engine come?

A. Oh, I judge about maybe ten feet.

Q. You tell this jury that the front drive-wheels on the engine that you were working on stood ten feet north of the south end of the pit?

A. Yes.

Q. So from the front of those drive-wheels to the end of the pit there was a ten-foot space?

A. Yes, sir.

Q. And how far were you sitting between the end of the pit and those first drive-wheels?

A. Well, I was just sitting about in the center.

Q. Then you were about five feet north of the south end of the pit?

A. Yes.

Q. Now, where did the front of the engine that Winters was working on stand with reference to this same post?

A. Well, that post was just about the same as the post was on our engine.

Q. Then the pilot of the engine that Winters was working on stood opposite the post to the west, and the one you were working on stood opposite the post to the east, that is correct, is it?

100 A. I ain't sure of that now, if there was two posts between us there or not, between the two engines.

Q. Well, you know that there is a post there between those tracks, don't you? You know there is a post between either one of those places there?

A. I am sure there is one between those tracks, but I don't know whether there was two.

Q. Well, this is the post that is indicated on this drawing here, and you say the pilot of your engine was right opposite that post. Now, was the pilot of the engine that Winters was working on right opposite the post on the opposite track?

A. No, it was right in the center.

Q. Sir?

A. The posts must have been in the center; the post is in the center of that space, about sixteen feet between the tracks and the front.

Q. It is so indicated right there. Now, was the pilot of the engine that Winters was working on north or south of that post? Nearer this wall or farther from the wall than the post is?

A. Oh, from the post? Oh, that must have been closer to the post; yes, that was closer to the post.

Q. Well, was the pilot of the engine that Winters was working on, did it stand in the same position with reference to that post that your pilot stood? Was his engine as far forward in the shop as the one that you were working on?

A. Well, I don't know that; I couldn't swear to that, if there was—

Q. Well, but you were closely observing the front of that engine, weren't you, that Winters was working on?

A. Yes, sir.

Q. You were very busy seeing what they were doing, you testified to that, didn't you?

A. I think our engine was a little farther back than his.

Q. You think, then, his engine was a little bit farther to the front than yours?

A. Yes, sir.

Q. A little farther to this front wall?

A. Yes, to the front wall.

Q. Now, you are satisfied that is correct?

A. Yes, sir.

Q. Now, you say this engine you were working on, the truck was out from under the front of it?

A. Yes, sir.

Q. How many wheels did it have? What kind of a truck?

A. Four wheels.

Q. It was a four-wheeled truck?

A. Yes.

Q. Now, you are positive about that, are you?

A. Yes.

Q. Don't you know that is the engine you was working on the day you have been talking about? (Showing witness picture.)

A. That ain't the engine I worked on.

Q. That isn't?

A. No.

Q. Will you say that that engine didn't stand on this second track here the day that Winters got hurt? Will you tell this jury upon oath that that very engine didn't stand on that track on that day?

A. We didn't work on that engine.

Q. Will you swear to this jury that that engine shown in that picture didn't stand on that track on the day that Mr. Winters got hurt, that engine that is pictured right there before you?

Mr. Barton: Which track, now, Mr. Miner? Are you referring to the second or the third track?

Mr. Miner: The third track.

Mr. Barton: I think you said the second.

Mr. Miner: The first track to the east of the track that Winters was working on.

A. This is one of the big engines.

Q. Yes, sir; and Mr. Winters says it was standing on a track right east of where he was working; do you say it wasn't?

A. We didn't work on that engine.

Q. I haven't asked you that, sir. I asked you if you will say upon oath that that engine shown on that picture didn't stand upon that third track on the day that Mr. Winters got hurt?

A. No.

Q. What do you mean by that?

A. I mean we put on the male casting, and them engines ain't got no male castings.

Q. I didn't ask you about that. I asked you if you will tell this jury upon your oath that that engine pictured there didn't stand on that third track shown on that diagram on the day that George Winters got his hand crushed?

A. We didn't work on that engine that day.

Q. No. The fact is you were working on an engine that was jacked up over on track 4 on that day, weren't you? An engine practically the same as the engine that Winters was working on, and between the engine you were working on and the engine Winters was working on stood that big engine shown in that picture; that is the fact, isn't it?

(Pause.)

Q. Sir?

A. I know we didn't work on that engine.

Q. Will you tell this jury that you didn't work upon an engine standing on track 4 there that day, and that this big engine wasn't standing on track 3 that day?

A. Track 4? This big one was standing on track 4?

Q. On track 3?

A. Oh, and I was working on track 4?

Q. Yes, sir; jacked up in the same way on track 4 that this engine on track 2 was jacked up. Will you tell this jury that isn't so?

A. Well, no, I couldn't; because—

Q. No.

A. Because them engines ain't got no male casting.

Q. I don't care anything about that. Will you tell this jury that

that engine didn't stand on track 3 and that you were not working on an engine on track 4 on the day that Winters got hurt?

A. Well, I guess I have to.

Q. Well, will you?

A. Well, I guess I have to.

104 Q. Now, what do you mean by that, that you were not working on an engine on track 4 or that you were?

A. I couldn't. If you are sure that that engine was on track—that that was on track 3.

Q. Yes, sir.

A. Well, I must have worked on the other one, because I know for sure we worked on a male casting; I know that for sure.

Q. Well, then you were working on an engine that was standing on track 4 instead of track 3?

A. It is news to me, though.

Q. Well, will you say that isn't so?

A. Well, that is something that I couldn't swear to.

Q. No. How many drive-wheels are there on that engine shown in that photograph?

A. There is eight—four on each side.

Q. Would you pretend to tell this jury that that engine stood on track 3 there and that those front drivers were ten feet back from the front of that pit?

A. No.

Q. No.

A. That is the wheel sticking out.

Q. Yes, sir; they would come clear up in front of that pit, wouldn't they?

A. Yes.

Q. If that engine stood on track 3?

A. Yes, sir.

Q. So that you couldn't have been sitting on the edge of
105 the pit if that engine stood on track 3, could you? That is true, isn't it?

A. No, I couldn't, unless you left it away back.

Q. Sir?

A. No. That would take more than—them big engines take more than the pit.

Q. Why, certainly, with that engine standing over there and those drive-wheels over that pit, you couldn't sit on the pit at all, could you?

A. No.

Q. Now, you know the engine that Winters was working on, don't you, engine 159, you were perfectly familiar with engine 159, weren't you?

A. No.

Q. What?

A. I seen it several times, but I never paid much attention to it.

Q. You didn't?

A. To any of the engines, that is, to the numbers.

Q. Well, but you know 159, don't you? You did before it was scrapped?

A. Yes, sure, because—

Q. And you knew the style of an engine that it was?

A. Yes, sir.

Q. The manner of its construction?

A. Yes.

Q. How it was put together?

A. Yes.

Q. You knew how the front of it was constructed, didn't you?

A. Yes.

106 Q. You knew that the front truck was what was called a female casting, just such as is shown in that Exhibit 2 that is in front of you there?

A. Yes.

Q. And you know that the front of the boiler was held up by what is called a male casting that you see right there on the floor in front of you?

A. Yes.

Q. Only when that is on the boiler of the engine it is turned over from the way it is now so that this part that is up is down, and the part that is down is up?

A. Yes, sir.

Q. And that part that is shown there, when the engine is together, fits right into this casting here, into that round space there?

A. Yes, sir.

Q. And when that engine was up with those jacks under it, you knew that one part of that engine was resting by one side of that upper casting on the edge of that lower casting, that it didn't go down into place where it belonged?

A. Yes.

Q. And they were trying to get it so that those two castings would come together properly?

A. Yes.

Q. Well, now, you know, don't you, that that side of that casting that was skewed a little was on the side of the engine towards where you were, the left-hand side of the engine, and they were trying to crowd it over in that direction so that that casting there would

107 enter into that place there; that is true, isn't it?

A. Yes.

Q. Then if that is true, and the jack under this corner here went down, instead of this corner over here going down, this one would go down with that edge of that casting there sitting on the edge of that casting, wouldn't it?

A. Yes.

Q. Couldn't go anywhere else, could it?

A. No.

Q. Instead of throwing this end of the pilot beam down it would throw the end down that the jack is claimed to have gone down under; wouldn't have pinched anybody over on this side at all; that is true, isn't it?

(Pause.)

Q. Isn't that true?

A. If the jack wouldn't—

Q. If the jack went down out here under the end of the pilot beam, and the edge of that casting there was sitting on the edge of that casting right there, this end of the beam here would go down instead of the one over here, wouldn't it?

Objected to as not proper cross examination.

Objection overruled.

A. If it would have went down at the same time the other one was down the jack would have went down on this side.

Q. And the edge of the male casting there was resting on the opposite edge of the female casting below, then that end of the pilot beam would have gone down instead of the other, wouldn't it?

108 A. Yes.

Q. Because the weight of the engine would be on that side, with the left-hand edge of the male casting setting on the left edge of that female casting, that would throw the weight on the other side, wouldn't it? That is true, isn't it?

A. I can't see into this.

Q. What is there about it you can't see?

A. You can have an engine standing on three jacks.

Q. I don't care anything about that. I am getting it as it was here. With one jack out under the left-hand corner, and the right jack down, and the engine resting on these two castings and on this jack, now suppose this jack goes down, with the edge of these two castings together, on the opposite side from the corner where the jack goes down, that is the end of the pilot beam that must go down, isn't it?

A. Sure, that couldn't stay up.

Q. Why, certainly. It couldn't do down with the edge of these castings resting together, could it?

A. No.

Q. No.

A. One side—wherever she is fast on one side—

Q. And if this jack over here had gone down four and a half inches and the engine was standing with the edges of those two castings together there, as I indicate on this photograph, and those castings had slipped into place, the front of the engine could
109 only go down the depth of that lower casting; that is true, isn't it?

A. Well, I don't know; I don't know about that.

Q. What? If that casting there on the floor slipped into this casting here, it could only go down the depth of that hole there; that is true, isn't it?

A. Well, I don't know if she will go that far or not if one jack is holding it.

Q. Well, assuming the jack went down—you say the jack went down—and when that slipped in there it could only go the depth of that hole?

A. Yes, that is right.

Q. And if that hole is two inches deep, it could only go down two inches; that is true, isn't it?

A. That is true.

Q. Consequently if the jack on this corner had gone down and this male casting had slipped into that casting and had gone down two inches, and this jack over here on the left-hand side was down four and a half inches, that pilot beam couldn't have gone down to cover that four and a half inches could it, with only the depth of that two-inch hole there; that is true, isn't it? Isn't that true?

A. Well, it couldn't went down any farther than——

Q. —the depth of that hole.

A. Than the depth of that hole.

Q. Yes sir; and if that was two inches deep it could only go down two inches?

A. Yes, sir; that is all right enough.

Q. But if this end out here was rigid, this jack set up, that
110 would necessarily throw this corner over here two inches lower than the bottom of that, wouldn't it, if this corner over here was rigid and tight?

A. Well, I don't know.

Q. What? If this one corner of the pilot beam over there resting upon a jack perfectly rigid, and then this casting here in the center slips into place and drops two inches, it must necessarily take this corner down four inches, mustn't it? This corner must go just as much lower than the bottom of that place as that corner is held above it, musn't it?

A. It would go down some, yes.

Q. It would go down just as much lower than the bottom of this as that corner is held above the bottom of this?

A. Yes, sir.

Q. So if that corner is held two inches above the bottom of that, and this dropped two inches in there, that would throw this corner down four inches, wouldn't it? It would have to go down the same distance below the bottom of this that that end was held above the bottom of this; that is true, isn't it?

A. I don't know.

Q. Well, isn't it true?

A. I couldn't swear to that, because I don't know how long she would go down, but I know she would go down some.

Q. It couldn't get below the bottom of that female casting, could it, Mr. Lang?

A. No.

Q. When it got there it would have to stop, wouldn't
111 it?

A. Yes.

Q. But if that corner over there was up two inches higher than that bottom, held perfectly rigid, this corner would have to go down that much more, wouldn't it? Couldn't get away from it?

A. Yes.

Q. Why, yes, of course; perfectly plain. And if, as a matter of

fact, there had been no jacks under there, and that edge of that casting had been sitting on the top of that edge of this female casting, then it would have been the opposite corner that would have sagged over, wouldn't it?

A. Yes.

Q. Supposing that these castings were sitting together on edge here, on the side that Winters was on, if there had been no jacks there at all, Larson's side of the engine would have sagged over in that direction, wouldn't it, if there were no jacks there at all and these two castings were resting on their edge there on Winters' side?

A. No, I don't believe it would.

Q. Well, would it remain perfectly straight up with the bearing on that edge so far from the center?

A. Well, you see, them engines got the most weight on the back, and I don't believe she would sag over.

Q. Well, suppose it was resting perfectly straight across there with those edges together, and that slipped into place, it would go straight down then, wouldn't it, just the depth of that place
112 there, two inches?

A. Yes.

Q. And if the jacks under each end were down four and a half inches and a person had their hand lying on top of those jacks, and that slipped into place that way, it wouldn't catch their hand, would it?

A. No, not if the jack is down four inches.

Q. Well, the testimony is the jack was down four and a half inches.

(No answer.)

Redirect examination.

By Mr. Barton:

Q. Mr. Lang, did you notice the position of this wrench that was in the jack on the left-hand side after the engine fell down?

A. It was down.

Q. Well, down how far?

A. I didn't look at that. Just when I walked over I seen she was down.

Q. Now, did you notice before the engine dropped down whether the castings under it were resting on each other or not?

A. No, I never looked at that; I didn't see that.

Q. What kind of an engine were you working on, Mr. Lang?

A. That was one of their standard engines.

Q. And how many driving-wheels were there on that engine that you were working on?

A. Four.

Q. On each side?

A. Two on each side.

113 Q. Are you sure, Mr. Lang, about the question of what pit you were working in?

A. Well, it is so long now, I couldn't swear to it; they got me puz-

zled up with that engine. I know we didn't work on that engine that day.

Q. Well, you mustn't allow us lawyers to puzzle you. Because he says that it is so and so, don't you believe it unless you know it.

A. Yes. He was hitting me pretty hard there, and I don't want—

Mr. Miner: I wasn't hitting you at all. I was asking you what you knew about this thing.

Witness: I do want to tell what I know.

Mr. Miner: Do that, and you won't get into trouble.

Witness: I don't want to favor nobody; tell the truth, that is all I want.

Mr. Miner: That is all I want, is the fact.

Q. You are shown this defendant's Exhibit 3, and are you sure that you weren't working on that engine; is that your—

A. I am sure we didn't work on that engine that day when Winters got hurt, I am sure of that.

Q. And are you sure that you saw the engine fall that Winters was working on? Are you sure of that?

A. I didn't see it fall, no.

Q. Well, you heard it, then?

A. Heard it, yes. Well, there is nobody that could see it; that goes quick.

A. There wasn't anybody else seed it.

A. No.

114 By Mr. Miner:

Q. How do you know it went quick?

A. Well, it must.

Q. Were you looking at it?

A. There wasn't anybody else seed it.

Q. Were you looking at it?

A. No, I wasn't looking at it.

Q. Then how do know it went quick?

A. The sound of them. I seen engines fall before like that; when they slip in they go quick.

Q. In the same way, the same kind of an engine?

A. Yes, the same kind, they are the only engines they have got that thing there.

By Mr. Barton:

Q. Now, Mr. Lang, where you were sitting could you see Winters' engine?

A. I could see it. I looked over through. I couldn't see the whole engine, and not half of it.

Q. Could you see the jack on the left side from where you were sitting?

A. I seen the jack.

Q. You got out of the pit that you were sitting in and went over—

A. To the engine.

Q. —to Winters' engine?

A. To that engine, yes.

Q. And in doing so did you go by the jack on the left-hand side?

A. Yes.

Q. How close to it?

A. Well, I went right up close, right up to it.

115 Q. Within how many feet did you get of it?

A. Oh, I went right up—

Q. Right up to it?

A. Right up to it.

Q. And you saw that it was down?

A. Yes.

Q. The jack was down?

A. The jack was down.

Q. And that the lever was in, and it was down?

A. The lever was in and was down; that is, the wrench.

Q. The wrench, yes. And when you got over to the engine you saw that Winters' hand was fast?

A. Well, I didn't know if it was his hand or what it was, I just seen that he was fast and squealing.

Q. Then you went to call his father?

A. Yes.

By Mr. Miner:

Q. Do you mean to tell this jury now that if this engine shown in this photograph, defendant's Exhibit 3 was standing on track 3, that you, while sitting there, saw the jack under the front end of the engine that Winters was working on?

A. Yes.

Q. You did?

A. I seen the jack.

Q. You mean to tell this jury that you could look through that engine that is shown there and see that jack?

A. Well, I looked through there, sure I did.

116 Q. Well, just point out where you looked through; tell them how you looked through there and what part of it you looked through.

A. There was a part I looked through, but I couldn't say just where; between the spokes you can see through sometimes.

Q. What part of it did you look through and look over to this other engine?

A. Oh, I couldn't say that any more, what part I looked through.

Q. Did you look through the spokes of the driving wheels or in front of the driving wheels or behind the driving wheels or where did you look?

A. I couldn't say that, Mr.—I couldn't swear to that, where I looked through.

Q. You couldn't swear to that?

A. I know it was through those openings. Of course, I had to look close to look through.

Q. You want to tell this jury, then, that if this locomotive shown

in Defendant's Exhibit 3 was standing on track 3 and you were working on an engine on track 4 you could look through this locomotive shown on Defendant's Exhibit 3 and see the front of the engine that Winters was working on?

A. I couldn't see the whole front of his engine.

Q. But you do want to tell them that you could sit over there with your feet hanging down in the pit, on track 4, and look through this engine on track 3 and see the front of the Winter engine on track 2; do you want to tell this jury that? Do you?

A. Well, I seen the jack.

Q. You saw the jack?

117 A. I seen the jack.

Q. Yes, I don't doubt that.

A. I seen the corner, the left corner, where the jack was.

Q. Yes, but did you see it when you were sitting over in the pit on the fourth track looking through the locomotive shown on Defendant's Exhibit 3? That is what I want to know. Is that when you saw it?

A. When I was sitting on the——

Q. Yes, sir; or did you see it after you came around in front of this engine and got near the Winter engine? Was then when you saw it?

A. Well, I didn't say that I looked at the jack, if it was up or down, until I went up to it. When I heard it fall I went over to the engine.

Q. Oh, then you didn't see the jack until you came around where the engine was?

A. Well, yes; I didn't pay no attention to the jack.

Q. You were concerned in knowing what was the matter with Winters, weren't you?

A. After it fell.

Q. You weren't taking a close survey of the surroundings there, you were looking at young Winters who was caught there?

A. I seen the jack first, and when I went up to it the jack was down, and I heard him squeaking, and I run up to the edge and looked over and I seen he was fast.

Q. And you claim the jack was down?

A. Yes.

118 Q. And you tell this jury that if the top of his jack was four and a half inches below the lower surface of that pilot beam—say this is the pilot beam, it was down here four and a half inches, and that engine had slipped into place by that male casting entering the female below, that this pilot beam could have been resting on his hand? Do you want to tell this jury that?

A. Well, if that jack——

Q. Do you want to tell this jury that?

Mr. Barton: Well, let him tell what he wants to answer your question.

Mr. Miner: I am examining this witness, Mr. Barton.

Mr. Barton: Yes, but you don't give him a chance to answer your questions.

Mr. Miner: I am giving him a chance to answer my question.

A. All I want to say now, if that jack on the left side would have stood up the way it was, that engine—he never got his hand pinched; he couldn't.

Q. He couldn't, eh? You told this jury a little while ago that if this jack was down here four and a half inches and the jack on the right-hand end stood rigid, and those castings slipped together, that this corner would have to come down on his fingers. Do you want to change that now?

A. Well, that jack couldn't have been down that far.

Q. Well, but he testifies that he did let the jack down that far; he said he let it down four and a half inches below the lower edge of that pilot beam.

119 Mr. Barton: Oh, Mr. Miner, no, Winters never testified to anything of that kind.

Mr. Miner: With a four-inch block and a half-inch space, you say that isn't four and a half inches.

Mr. Barton: You say Winters testified that he let his jack down four inches. Now, you are mistaken.

Mr. Miner: No, I say when the block was off, the top of that hydraulic jack was four and a half inches below the under surface of that pilot beam.

Witness: Well, there is a thing I can't say anything to it at all; because I don't know what kind of a block he had on there.

Q. I am not asking you about that. I say if that top of that hydraulic jack, as Mr. Winters testified, was four and a half inches below the lower surface of that pilot beam, and that engine slipped into place and came down two inches, it couldn't have crushed his hand, could it?

A. Not if he had it down that low.

Q. No, sir. And the only way it could have been done is to have held this other end two inches above the casting, and that would have thrown it down four inches, and that would have caught his hand; that is true, isn't it?

A. Well, that part of it is true.

Q. Yes, that part of it is true, there is no doubt about it. You said what you meant by the engine falling was that that casting lying there on the floor entered into its proper place in this casting here?

A. Yes.

120 Q. That is what you mean when you tell the jury that the engine dropped?

A. Yes.

Q. You mean that casting there went into its proper place in this casting shown on this photograph?

A. Well, it couldn't have dropped anywhere else, yes.

FRANK MARTIN, sworn on behalf of plaintiff, testified:

By Mr. Martin:

Q. Where do you live, Mr. Martin?

A. Searboro, Iowa.

Q. Did you at one time work for the Minneapolis & St. Louis Railroad Company?

A. Yes, sir.

Q. Working for them now?

A. No, sir.

Q. When did you quit?

A. 26th of last May.

Q. Were you working there at the time George Winters got hurt?

A. Yes, sir.

Q. What kind of work were you doing at that time?

A. I was machinist apprentice at that time.

Q. Tell us what is the difference between a machinist's apprentice and a machinist's helper?

A. Machinist's apprentice is supposed to serve four years learning the machinist's trade, while the machinist's helper only does the work of machinist's helper, he is an assistant.

121 Q. I see. How long had you been working as a machinist's apprentice?

A. About two years and a half.

Q. So you had served most of your time as an apprentice?

A. Why, half of it; yes, sir.

Q. Who were you working under that day that Winters got hurt?

A. The back shop foreman, Mr. Winters, acting for Chris Mitchell that day.

Mr. Miner: Who was back shop foreman?

Witness: Mr. Mitchell.

Mr. Miner: Gene Mitchell?

Witness: Chris Mitchell.

Q. What engine were you working on the day Winters got hurt?

A. At the time he got hurt I was working on the same engine.

Q. Working on the same engine that Winters was working on?

A. Yes, sir.

Q. Who else was working on that engine at that time?

A. I think that another machinist by the name of Peter Griffin was working there.

Q. And anyone else?

A. Well, there was George Winters and Dode Conn and young Larsen.

Q. Then as you recollect it, there were five of you working on that engine at the time Winters got hurt?

A. Yes, sir.

122 Q. What work were you doing at the time he got hurt?

A. I was instructed to put on main rods and connect up the brake rigging.

Q. And what were you in fact doing? You say you had been in-

structed to do those things; what were you actually doing when he got hurt?

A. I was putting on the nuts on the bolts on the strap in the back end of the main rod.

Q. On which side of the engine?

A. On the right side.

Q. That is the side he got hurt on?

A. Yes, sir.

Q. How close to Winters were you working?

A. Oh, it is at least twelve feet; twelve or fifteen feet.

Q. What was the first thing that attracted your attention to something having gone wrong?

A. Well, the noise it made when it came together, when the castings came together and I heard George scream.

Q. What did you do then?

A. I jumped up and went up there to where George was.

Q. And what did you find when you got to him?

A. Well, Conn, the machinist, was there starting to let the jack down, and he hadn't turned the jack handle over, and I grabbed Conn and shoved him to one side, kind of to one side, and told him to let it down, and I at the same time grabbed hold of the jack handle—
123 handle and turned it over, and then Conn came with me and so we pushed it down and released his hand.

Q. Then what did you do?

A. Well, I went out, we walked about, well, out past the front of the engine, and about—well, if the engine was facing this way, we walked out kind of this way, kind of towards the window, and George pulled off his glove.

Q. And then did you take any notice of the jack on the left-hand side?

A. There was some one came running up there, and I looked in that direction, around on the opposite side of the engine from where I was, and I saw then that the jack was down.

Q. That is, the jack on the left-hand side?

A. Yes.

Q. Was the lever in the jack on the left-hand side when you so observed it?

A. I didn't notice that; all I noticed was the jack was down at that time.

Q. All you noticed was that the jack was down, that is, the jack on the left-hand side?

A. Yes.

Q. Do you recollect anything about what engine, if any, was standing on the next track east of this engine that you were working on?

A. No, I don't remember of any engine being there; I didn't take notice of it.

Q. Do you recollect seeing Larson when you were with Winters after his hand was caught?

A. Yes, he was standing there.

Q. Standing where?

124 A. Right by the side of Winters.

Q. Right beside Winters?

A. Kind of back of him a little.

Cross-examination.

By Mr. Miner:

Q. When you say you stepped over here to this window and looked around you don't know whether anybody had been to that left-hand jack or not?

A. No, I do not.

Q. Larson might have gone and let it down for all you know, or somebody else might have done it; that is true, isn't it?

A. Yes, sir.

Q. You worked there how long?

A. At that time I worked there over two years and a half.

Q. You were pretting familiar with those engines?

A. Well, I was getting to be, yes.

Q. You knew how they were constructed?

A. In a way, yes.

Q. You knew the construction of the front trucks and the way the boiler was resting upon the front trucks of engine 159?

A. Yes, sir.

Q. You knew that the front truck consisted of a very heavy casting called a female casting that is represented by the photograph which I show you, defendant's Exhibit 2?

A. That looks like the truck, yes, sir; or one similar.

125 Q. And you knew that the front of the boiler, when in place, that the casting that you see on the floor there, the male casting, would be in this position shown in this casting in Exhibit 3?

A. Yes, sir.

Q. That is, the two would be together, this casting on the floor would enter down into this defendant's Exhibit 3 here?

A. Yes, sir; when it was in place.

Q. That round place shown here. That is the way the engine was when properly together?

A. Yes.

Q. Now, these jacks, this jack that young Winters had, and the jack that young Larson had, were under the ends of the pilot beam?

A. Yes, they were.

Q. And that pilot beam and those jacks you knew had been lifted up so that these weren't in place, these castings, they weren't together?

A. No, they weren't.

Q. You knew that they had been putting new tires on to the wheels of that engine?

A. Yes.

Q. And that the engine had been raised up for the purpose of putting those tires on?

A. Yes, sir.

Q. And you knew, did you not, that when they came to take the timber out from off this front truck, that the boiler was resting upon, that the two castings didn't come together properly?

A. I had heard them make some kind of remark, although I didn't go up and see.

Q. That the boiler had swerved a little bit to the right
126 so that the two castings wouldn't come perfectly into alignment?

A. Yes, sir.

Q. Now, if that were true, and the male casting on its right edge was resting on the right edge of this female casting, and the jack on the left-hand corner under the pilot beam was let down, then that pilot beam would tip on that end, wouldn't it?

A. The jack on the left-hand of the pilot beam was down?

Q. Let down, and these two castings were resting upon their right edge, as I indicated right there, that end would go down, wouldn't it?

A. Yes, sir.

Q. If the jack on the left end were up under the pilot beam, so that the front of the engine rested on the pilot beam, the right end of that jack, and with these two edges of the female and the male casting together, resting on each other there, not in place, if this left-hand jack should remain stationary and those castings should slip enough to come into place so that that dropped that two inches, it would throw this right-hand corner of the pilot beam down, wouldn't it?

A. It would.

Q. Yes, and it would go just as much below the bottom of that hole in that female casting as the right-hand corner was raised above that bottom, wouldn't it?

A. It would depend upon the amount of give in the springs.

Q. Well, but if there was two inches, say, the depth
127 of that hole there, and this right-hand jack was up so it was just on a level with the top of the edge of that female casting, and that slipped in there it would throw this right-hand end down two inches below that bottom so much?

A. It would that, it would go down even with the bottom, go down two inches.

Q. It would go down more than two inches, wouldn't it, if this corner here was rigid?

A. If this corner was rigid and was setting two inches——

Q. ——and it slipped into place——

A. ——this corner would go down two inches, yes.

Q. It would go down as much below the bottom of that as the opposite corner was above it?

A. Yes, sir.

Q. So that if that corner here were rigid and that held fast, and those two castings slipped together, it would throw that end down four inches?

A. Yes, it would throw it at least four inches.

Q. If those castings were resting, as I say, with the bottom of the male casting resting on the right-hand edge of the female casting, and there were no jacks under the pilot beam, and the castings slipped into position so that the male dropped that two inches, the pilot beam could only go down two inches; that is true, isn't it?

A. It would go down two inches and whatever the springs—yes.

Q. Well, but the springs couldn't have anything to do with that male casting dropping into that two-inch space there, could it?

128 A. No, it would go in there two inches, yes.

Q. If there was no support on either edge and it simply slipped into place there, it could only go down two inches?

A. Yes.

Q. In that case it wouldn't be affected by the give of the springs, if there was nothing under either end of the pilot beam?

A. If there was nothing under either end of the pilot beam it would go down more than two inches.

Q. How could it?

A. Because the springs is bound to give with the weight of the engine on the truck.

Q. On what truck?

A. On this truck.

Q. On the rear truck?

A. On that front truck.

Q. If that casting there slipped into that place there it couldn't possibly do down any lower than the depth of that place, could it?

A. Why, it would be bound to give some—go two inches, whatever the thickness of the casting, yes.

Q. Whatever the depth of that hole is, it would be bound to go down that depth?

A. Yes, sir.

Redirect examination.

By Mr. Barton:

Q. Mr. Martin, you have spoken about springs; are there any springs on the trucks under the engine?

A. I think there are; in fact, I know there are.

129 Q. And where were those springs on this particular engine with reference to the plate shown on the photograph Defendant's Exhibit 2?

A. Those springs would be underneath this casting along the sides there.

Q. What are those springs like? Are they twisted—

A. Well, the ends of them come together like that (indicating); they are sort of round, you know.

Q. Assuming that the engine did drop into place so that the castings went together, what effect would that have on the springs of those trucks?

A. Well, the weight coming over the casting would have a tendency to flatten the springs out, allowing the engine to come down; I don't know how much more, but it would come down some.

Q. Could you give us an estimate of how much those springs would settle down with the weight of the engine coming on them?

A. No, I could not.

Q. Well, would it be as much as two inches?

A. No, I don't think it would.

By Mr. Miner:

Q. That is a picture of that female casting, Mr. Martin. Will you just show the jury where the springs are that hold that, that you are speaking about?

A. Those springs are underneath this casting alongside here.

Mr. Barton: Now, then, point to it again.

Witness: The spring is along here on each side underneath
130 this casting. There is a sort of a—oh, I don't know just what you call it, there is an arm that hooks on to one box, and comes down here and hooks on to another one. There is two of them on a side here.

Q. On the front casting?

A. Yes.

Q. Well, now, will you tell the jury what those heavy bolts which you say hold that casting in place, what they go through, and do you mean to say those are loose so that they bob up and down there?

A. No, this whole thing is solid, the top part is solid.

Q. Perfectly solid?

A. Yes.

Mr. Barton: Do they use springs under them?

Witness: They use springs under all them trucks.

Adjourned until the morning of March 23, 1915.

CHARLES WINTERS, sworn on behalf of plaintiff, testified:

By Mr. Barton:

Q. Mr. Winters, you are the father of George H. Winters, the plaintiff in this case

A. Yes, sir.

Q. You live at Marshalltown, Iowa?

A. Yes, sir.

Q. Who are you employed by?

A. M. & St. L. Railroad Company.

Q. In what capacity?

A. Machinist.

131 Q. How long have you been working for the M. & St. L.?

A. Well, ever since they bought the Iowa Central; I don't know just how long that has been.

Q. Several years?

A. Yes.

Q. Did you work for the Iowa Central?

A. Yes, sir.

Q. How long had you worked for the Iowa Central?

A. Well, about thirty-one years, something like that, for the Iowa Central and the M. & St. L.

Q. How long as a machinist?

A. Well, I was roundhouse foreman for about nine years.

Q. And the balance of the time as machinist?

A. The balance of the time I was machinist.

Q. Now, as roundhouse foreman what were your duties?

A. Well, I had charge of the roundhouse and the engines and

men.

Q. Had you charge of the machinists?

A. Yes, sir.

Q. Machinists working there. When you say you had charge of the roundhouse and charge of the machinists, what if anything did you have to do with the work, did you have supervision over their work?

A. Yes, sir.

Q. Had you experience as a machinist outside of your employment by the Iowa Central and the Minneapolis & St. Louis Railroad Companies?

132 A. Yes, sir; I worked about nine months for the Chicago Great Western.

Q. Where did you learn your trade of machinist?

A. Marshalltown.

Q. You were working then for the M. & St. L. at the time your son was injured?

A. Yes, sir.

Q. Where were you at the time you first learned of his injury

A. I was under an engine about five or six stalls from him, five or six, something like that, on farther up in the house.

Q. And when you speak of being under an engine, were you under the engine engaged in this work?

A. Yes, sir.

Q. When you learned of his injury what was the first thing you did?

A. Why, I got out from under the engine and run right over to the shop where they had him.

Q. He had been taken away from the place where he was injured before you got there?

A. Yes, sir.

Q. Did you at that time make any examination or notice anything connected with the engine where he had been hurt?

A. No, sir; I did not.

Q. You went off with him?

A. Yes, sir.

Q. So you know nothing about the particular accident?

133 A. No, sir; I don't.

Q. In your work as machinist have you come in contact with and had to use hydraulic jacks?

A. Yes, sir.

Q. By the way, about how many machinists are there employed on an average there at Marshalltown by the Minneapolis & St. Louis Railroad Company?

A. In the entire shop?

Q. Yes.

A. I think there is about something like sixty.

Q. Sixty?

A. Yes.

Q. You have spoken of the roundhouse, being roundhouse foreman; what other buildings besides the roundhouse are there there?

Mr. Miner: I object to that as immaterial.

Mr. Barton: Well, if you will say you will waive all question of the application of the federal statute in this case, then perhaps that might eliminate it.

Mr. Miner: I suppose it is for the court to decide under that stipulation whether you are properly under the federal act or not.

Mr. Barton: Of course, your Honor, to make myself clear, this court and the Supreme Court have passed on this stipulation in this case holding that it is sufficient, but the defendant has a right, of course, to go to another court, I suppose, and I think evidence of this kind might be material and important. That is what I have in my mind, your Honor.

134 Mr. Miner: In the appeal that was taken of this case to the Supreme Court of this state, they held that upon that stipulation at the time of the injury here he was an employe in interstate commerce. I suppose that is conclusive on this court.

The Court: That is what they have held in this opinion, I understand.

Mr. Barton: Yes, that is right, but what I had in mind, of course the defendant- have the right to go to the federal court on that question if they want to, and whether I have any right to anticipate that or not and offer evidence in anticipation of it, is another question, I am free to admit.

The Court: I think unless the facts are all changed I would leave that to the Supreme Court.

Q. Was your work, Mr. Winters, confined to work in the roundhouse, or did you have to work at other places?

A. No, sir; just the roundhouse.

Q. And was that true during your entire experience there?

A. In the roundhouse?

Q. Yes. That is, you have given us a long number of years that you have worked as a machinist; now, was all that experience confined to the roundhouse?

A. No, sir; I worked one year in the back shop, machine shop.

Q. How many hydraulic jacks were there being used in the year 1912 in that roundhouse?

Objected to as immaterial. Objection overruled.

A. Well, we had two 15-ton jacks, we had two 20-ton jacks,
135 and we had six 30-ton jacks, and there was two 40-ton jacks.

Q. That would make twelve jacks in all?

A. Yes.

Q. Now, when you say two 20-tons and six 30-tons, etc., what do you mean by so much a ton, what do you mean when you say a 30-ton jack?

A. Well, that is the capacity of the jack, what it will lift, how many tons.

Q. What is the size of this jack here in court?

A. Well, that is a 30-ton jack.

Q. Did you use any other kind of jacks in that roundhouse besides hydraulic jacks?

A. Yes, sir.

Q. What kind?

A. We had a screw jack that we used.

Q. Any others?

A. Well, we had some Norton jacks that we used sometimes; they was over in the shop most of the time, but sometimes we would go over there and get them. Perhaps all of these jacks would be in use that we could use, and sometimes we would go over and get them.

Q. Now, Mr. Winters, were these screw jacks and hydraulic jacks used promiscuously or was the hydraulic jacks confined to one kind of work and the screw jacks to a different kind of work?

Objected to as immaterial. Objection sustained.

Q. How are the hydraulic jacks operated when you want to raise them up, Mr. Winters?

A. Pump them up and down with the lever there.

136 Q. What is the construction of the jack that enables you to pump it up and raise it?

A. Well, there is a plunger inside of it there that pumps the oil or liquid, whatever they use in it, and there is a valve there that it works, and there is a valve in the bottom of the piston that goes down in there, and a leather around that cup, leather that holds the pressure; you pump the liquid out of the top down into the bottom through these valves, and it raises the jack.

Q. When you speak of liquid, what is used in the jack?

A. Well, they have been using oil down there now, signal oil and kerosene.

Q. What were they using in 1912?

A. I think there was signal oil in that jack.

Mr. Miner: Well now, do you know?

Witness: I don't know; I don't know what jack they had exactly.

Q. Well, you say they were using signal oil in their jacks in 1912?

A. Yes.

Q. Now, what is signal oil? Can you describe it so we will understand what it is? Is it like some other kind of oil that is in common use?

A. Why, it is about like a kerosene; you can hardly tell the difference in them unless a man is familiar with the two oils.

Mr. Miner: I suppose it is called signal oil to distinguish it from some other kind of oil, isn't it?

Witness: I suppose so; I don't know.

Mr. Miner: Quite naturally, I should think.

137 Q. Well, he says it is very much like ordinary kerosene oil.

A. Yes, thin oil, just about like that.

Q. You speak of there being a piston. Now, what do you call the piston to this, the part of it between the top or the head and the bottom?

A. Yes, sir; the part goes down into the cylinder there.

Q. Now, that piston, is it permanently attached to either the bottom or the top?

A. No, sir; it screws on to the top there and free at the bottom, to go up and down.

Q. Well, then it is permanently attached to the top if it is screwed on?

A. Yes, it is screwed on. You can remove it by——

Q. And works freely in the bottom?

A. Yes, sir.

Q. You say there is oil in the top and also in the bottom of the jack?

A. Oil in the bottom when you pump it in.

Q. How do you get the oil into that?

A. Pump it in there through that——

Q. Into the top or into the bottom?

A. Oh, to fill it, you mean?

Q. Yes.

A. A little screw there on top of it, you take it out and pour it in there.

Q. This screw here?

A. Yes, sir.

Q. Then when you raise it which way is that oil pumped, down from the head?

138 A. Yes, sir.

Q. And how does it get into the bottom?

A. That plunger there forces it in.

Q. Is there a hole through the center of the piston that goes down?

A. Yes, sir. The plunger works inside of it.

Q. A plunger works inside of what?

A. Inside of the piston there.

Q. So that by this pumping operation you force the oil out of the head of the jack into the bottom?

A. Well, it draws it out of the head; when you raise up the lever the valve opens and lets the oil go down through, and when you push down it shuts the valve and forces it down through the valve in the piston there, under the piston.

Q. How much can you raise the head by that operation?

A. Eleven inches, them jacks, if they are working right.

Q. Is there anything that holds the head up after you have it pumped up other than the oil that is below the end of the piston?

A. No, sir.

Q. The pressure, then, on the head of the jack is all on the oil that is in the bottom of the jack?

A. Yes, sir.

Q. When you have it up how do you lower it?

A. Turn the lever over and press down on it, press it down.

Q. Now, when you refer to the lever you mean the lever I hold in my hand?

A. Yes, sir.

139 Q. The one with the lug on the one side?

A. Yes, sir.

Mr. Barton: I guess we had better have this marked as an exhibit. We might have it understood that the open-end wrench will be plaintiff's Exhibit A, the lever with the lug on the side will be B and the jack itself C. Plaintiff served notice on the defendant to produce the original levers and jack being used at the time of the accident, the same was served on March 2d, and I offer that in evidence now (Plaintiff's Exhibit D), demand for the production of the originals.

Mr. Miner: Well, what for?

Mr. Barton: Because we want it.

Mr. Miner: Well, you have got them here and got them marked.

Mr. Barton: No, you told me yesterday these weren't the originals.

Mr. Miner: I did not. I told you that that open-ended wrench so far as I knew was the one you called for, we had produced the wrench and the lever that you used on the other trial.

Mr. Barton: Well, I demanded the originals, your Honor, and I want to make the record of it.

Mr. Miner: The originals are in court.

The Court: That is what I understood.

Mr. Miner: The open-ended wrench we know nothing about; we have been unable to identify it; their witness Larson couldn't identify it, and I produced the wrench which they themselves used on the former trial.

140 Mr. Barton: Then do I understand that you now say this jack and the wrench with the lug on the side are the ones that were being used on this engine by the plaintiff at the time he was injured?

Mr. Miner: No, those were the ones that were being used by Larson at the time the plaintiff was injured.

Mr. Barton: Very well, I want that record. I offer this notice to produce, Exhibit D, in evidence.

Mr. Miner: Well, I object to that as incompetent.

The Court: I will let it in, but when the defendant produces all that is in its power, that is all they can do.

Q. Now, Mr. Winters, this Exhibit B which I hold in my hand, is that the kind of a lever that you say you turn upside down and use when you are wanting to lower the jack?

A. Yes, sir.

Q. What is the purpose of the lug on the one side of this lever?

A. That is to keep from tripping the jack when you are jacking it up.

Q. If you are raising it you enter it in the jack the way I have placed it now?

A. No, sir; you have got it in wrong side to.

Q. You didn't catch my question. If you are raising the jack, you mean it should go in from the other side?

A. Yes, sir.

Q. Oh, when you are raising the jack you enter it with the lug down?

A. Yes, sir.

141 Q. And when you want to lower it you take it out and turn it with the lug up?

A. Yes, sir.

Q. The effect of so turning it with the lug up leaves the handle go lower down?

A. Yes, sir.

Q. What is the effect on the jack of so lowering the lever beyond the point where it catches the lug if the lug side is down?

A. It allows that plunger to travel down far enough to trip the valve in the bottom of the piston and opens it.

Q. And the tripping of the valve in the bottom of the piston does what?

A. That lets the oil back up into the head and the jack goes down.

Q. Does the valve open at one particular point, or does the lever have to pass through considerable space in order to complete the opening of the valve?

A. Well, after it touches the valve it only has to open it about a sixteenth of an inch, something like that.

Q. Well, what I mean is, with the use of this lever in a manner that is intended to open it, does it make any difference how much you use the lever in order to open it?

A. How long you hold it down or——

Q. Yes.

A. Why, as long as it is down there the jack goes down. It will go right down if you leave it there.

142 Q. Well, what I am trying to get at is this: Now, the lug is on the lower side and it is down to the bottom?

A. Yes, sir.

Q. Will the jack trip, that is, will it open that valve in that position, that leaves the oil go to the bottom or go to the top?

A. No, sir.

Q. How much lower must you get the lever in order to open the valve that permits the oil that is in the bottom to go to the top?

A. The length of that lug that is on there.

Q. About the length of the lug?

A. Yes, sir.

Q. Just by turning it over and leaving it go as far as it will go down, the lever opens it?

A. Yes, sir.

Q. Then do I understand that that valve which so permits the oil that is in the bottom to go to the top, opens at a given point?

A. Yes, sir.

Q. And it matters not whether the lever goes farther than that or not?

A. No, sir.

Q. The moment the lever reaches that given point the valve is opened right then?

A. Yes.

Q. Then if you leave the lever remain in the position, down low enough to open it, does the top go clean down or only part way?

A. It goes clear down if you leave it there.

Q. How could you stop it from going clean down?

143 A. Raise up on it.

Q. Raise up the handle?

A. Yes, sir.

Q. If the lever is left in and not touched after it has been lowered to the opening point of the valve, it means that the head of the jack will go to the bottom?

A. Yes, sir; it will go right down.

Q. The reverse of that, however, is not true; when you are raising it every motion of the lever will raise it up a certain distance?

A. Yes, sir.

Q. And if you stop, why, the jack stands there, is that right?

A. Yes, sir.

Q. So that you may raise the jack either one inch or two inches or five or eight or ten or eleven, just as you want to?

A. Just as you want; yes, sir.

Q. And it will stand just where you stop, pumping?

A. Yes, sir.

Q. But no difference whether you have it up one inch or five inches or ten inches, if you want to lower it and trip the valve in the bottom of the piston, it will go clean to the bottom?

A. Yes, sir.

Q. Is that right?

A. Yes, sir; it will go clear to the bottom unless you raise up on the lever.

144 Q. Unless you raise up on the lever. If the jack is raised by pumping the head up in the manner in which you have spoken of, and an open-end wrench such as Exhibit A is were used to so pump it up, and that lever left in as far as it would go in, or any shorter distance, would it trip the jack if left to stand alone?

Mr. Miner: Now, wait a minute. I object to that as incompetent. The question whether that would occur or not is a question of fact and not a question of opinion. That would depend wholly upon the weight, of course, attached on top of the jack, as to whether or not anything inserted in the jack itself were of sufficient projection, sufficient weight to overcome the weight on top.

The Court: I think it is a question of fact how much they had to lift up and how much that downward pressure would be. It

doesn't necessarily follow that it would fall if you put anything in there.

Q. Well, Mr. Winters, so far as the tripping of the jack is concerned by the opening of the valve in the bottom of the piston, does it make any difference whether you have got a load on the jack or not? I mean, now, so far as the opening of that valve and permitting the oil to go from the bottom of the jack to the top is concerned.

A. Well, it don't make a great deal of difference; it might make a little.

Q. What difference would it make?

A. Oh, it wouldn't make over a pound's difference.

Q. Well, what do you mean, wouldn't make over a pound's difference in what respect?

A. I mean the heft to open the valve.

145 Q. Does it require a pressure downwards on the lever to open the valve?

A. No, sir; a wrench of that kind is heavy enough to open it.

Mr. Miner: I object to that, if the court please, and move that that answer be stricken out.

Mr. Barton: I think it is clearly the subject of expert testimony and the conditions surrounding the matter might be the subject of cross examination, but the witness ought to be competent to say whether this jack will trip under different conditions. We had this same thing up before and it went before the Supreme Court, and they said nothing about it in their opinion.

The Court: I don't know anything about it, but it seems to me that there ought to be some basis for this testimony, for an expert opinion.

Q. Were you familiar with engine 159 of the M. & St. L.?

A. Yes, sir.

Q. Supposing that engine was standing in the roundhouse at Marshalltown, Iowa, the wheels all on, the driving-wheels, and the rear of the engine was resting upon four screw jacks placed underneath the iron that runs across the rear of the rear part of the engine, two of the screw jacks being on one side and two on the other, and the front of the engine had been raised up by two hydraulic jacks of the kind this is here in court, one of those hydraulic jacks on either side of it and under the ends of the pilot beam, so that the engine was so resting upon those screw

146 jacks at the rear and the two hydraulic jacks at the front, and that the hydraulic jack on the right side had been lowered so that it was free from the pilot beam, and that a wrench similar to Exhibit B here had been used in this jack on the left-hand side when it was last pumped up, and that wrench had been left in the jack when so last pumped up, would that open-end wrench so let in settle down of its own accord and trip that jack?

Mr. Miner: I object to that as incompetent, calling for an opinion upon a matter that is not a subject of opinion evidence, a matter of

fact, upon the further ground it is not an accurate statement of the testimony because it assumes that the weight of the engine was resting upon this jack, where the proof shows it was resting upon the casting and upon the jack. I object further that it assumes that the wrench in court is in length, in thickness, in weight and in width identical with the wrench which young Larson was using, and Mr. Larson himself testified as to this wrench that he couldn't tell how it corresponded in those particulars with the wrench that he was using.

Mr. Barton: Well, that is the objection which I had a minute ago, and I have demanded the production of the original, and this is the objection that was made before and passed up to the Supreme Court, and they said nothing about it.

Objection overruled. Exception by defendant.

A. Yes, sir; it would.

147 Cross-examination.

By Mr. Miner:

Q. You are the father of this young man that got hurt?

A. Yes, sir.

Q. You have testified twice before in this lawsuit?

A. Yes, sir.

Q. You are an expert with reference to these hydraulic jacks?

A. Well, I have used them for thirty years.

Q. You are an expert with reference to these hydraulic jacks, are you?

A. Yes, sir.

Q. You know all about them?

A. Yes, sir.

Q. Now, you tell this jury that in the first place you put the oil into the top of this jack here?

A. Yes, sir.

Q. And when you want to raise this jack up by the operation of that lever you open a valve below there and that forces the oil into the base of that jack?

A. Yes, sir.

Q. And as the oil is forced into the base it forces this up?

A. You are getting that mixed up. Tell me what your question was.

Q. Tell me how that raised that jack, will you?

A. Yes, sir.

Q. Well, go ahead and tell.

A. You raise the lever up and it sucks the oil from the top of the jack down through that plunger valve.

148 Q. Yes, sir; into the base of the jack?

A. No, sir.

Q. Where does it go to?

A. Goes down under the plunger.

Q. Well, isn't that down into near the base of the jack?

A. That ain't the base of the jack, that is the bottom of the piston.

Q. Down at the point I indicate here now, isn't it, right down under that handle?

A. Well, down there where the piston stops.

Q. Well, where does it stop?

A. Well, wherever it measures down.

Q. Come down here and show the jury where that stops, please.

A. This piston goes down to about there (indicating).

Q. Well, then the oil goes down through—

A. You draw this oil out of this head down through here into the bottom of this, and then when you press down on it it forces it out of here down into the bottom of this and raises it up.

Q. Yes.

A. Yes, sir.

Q. So that when you get through pumping, the top of this jack is resting upon that oil below?

A. Yes, sir.

Q. And whatever pressure is on top of this jack is held up by that piston pressing on that oil in the base of that machine?

149 A. Yes, sir.

Q. And you want to tell this jury that it don't make any difference how much weight you put on there, that that jack trips just as easily with no weight on top as it does with 10,000 pounds or 30,000 pounds on top of it?

A. I didn't say so.

Mr. Barton: That isn't a correct statement; he didn't say so. I object to your misstating the evidence.

Q. Didn't you so state?

A. No, sir.

Q. Didn't you tell this jury that it wouldn't make one pound's difference?

A. No, sir.

Q. The amount of weight that was on top of that jack?

A. No, sir.

Q. As to whether that jack would trip or not?

A. No, sir; I didn't.

Q. You didn't testify to that?

A. No, sir; I didn't.

Q. (To reporter.) Will you go back and get that testimony, please?

A. I told you it would make about one pound's difference.

Q. Exactly.

A. Yes, sir.

Q. You tell this jury that it don't make any difference whether there is 30,000 pounds resting on top of that jack or nothing, that a difference of one pound exerted on that handle will trip that

150 jack?

A. Yes, sir.

Q. You want that to stand as your testimony on oath, do you?

A. Yes, sir.

Q. All right, sir. If you want to so testify, that is all right. Now, you say you were familiar with this engine 159?

A. Yes, sir.

Q. You know all about it?

A. Yes, pretty near.

Q. You know that engine 159 in its front truck had a female casting such as that shown by the photograph, do you?

A. Yes, sir.

Q. Do you know the size of that casting?

A. No, sir; not exactly.

Q. Do you know the weight of that casting?

A. No, sir.

Q. Do you know the thickness of that casting?

A. No, sir.

Q. Do you know that that casting that is lying on the floor there is the male casting that goes into this casting on this photograph?

A. That is the same as goes in there.

Q. Do you know the weight of that locomotive 159?

A. No, I usel to, but I forgot. I don't remember all those weights of engines and castings, I never tried to remember that.

Q. And you have forgotten that, have you?

A. Yes, sir.

151 Q. You don't remember that now?

A. I don't remember the weights, no, sir; there is too many weights on an engine to remember.

Q. Now, if that casting there was in place on the front of that locomotive and this truck stood under that casting, and that front of that engine was resting with the right side of that casting there on this rim of this lever casting, and there was a jack sitting out here on the left-hand side under the end of the pilot beam, the front of that engine would have two points of bearing, wouldn't it, one between those two castings, and one on the jack?

A. Yes, sir.

Q. And if in that position this jack out here went down, that end of the pilot beam, the left end of the beam, would go down instead of the right end of the beam, wouldn't it?

A. How is that now? Give me that again.

Q. All right, sir. Suppose that that casting right there was in its place in front of that engine, and the edge of that casting was resting on top of that edge of that female casting, that would put it so many inches to the right of the center of that boiler, wouldn't it?

A. Yes, sir.

Q. That would put the greater weight on the left-hand side, wouldn't it? Every inch you move from there over to the right would put the weight of the boiler over on the other side, wouldn't it? That is, the bearing would be here instead of in the center?

A. Yes.

152 Q. And if this jack out here went down, this jack out to the left side of the engine, that end of the pilot beam would go down instead of the right pilot beam, wouldn't it?

A. Well, they would both go down.

Q. If that casting remained on that edge there, how could that come down anywhere?

A. Force the truck down.

Q. Force the truck down?

A. Yes.

Q. How much could the truck be forced down?

A. Could be forced down four inches.

Q. Could be forced down four inches?

A. Yes, sir. It is on springs under here, and it has four inches to go up and down.

Q. It has four inches to go up and down?

A. Yes, sir.

Q. Then when the engine is in its place you mean those springs are taut down four inches?

A. They go down four inches.

Q. They are down four inches, are they, when the engine is in its place there?

A. No.

Q. No. You know that these springs are put in there simply to meet an extraordinary weight, don't you, or movement of the engine, or any jar of the engine?

A. They carry the entire weight of the front end of the engine.

Q. And if those castings stood in the place that I have indicated there, and that slipped into place, the minute it slipped, those
153 trucks would spring up to meet the engine? If it slipped into place, the minute those two castings sprung into place there, the spring of that truck would come up?

A. No, sir; the weight of the engine is supposed to compress the spring down two inches; that gives two inches on the bottom and top.

Q. You know they make an allowance there of not over one inch for the operation of those springs in engine 159?

A. No, sir. They are supposed to be divided so as to go up and down; either up so far or down so far. That is what they figure on.

Q. That is what they figure on?

A. Yes, sir.

Q. They have got figures showing that, have they?

A. I figure that way.

Q. You know, don't you, that the builders of these engines have accurately tested those things and have figures of that?

A. I don't know.

Q. And don't you know that the allowance you speak of is one inch?

A. Well, sir, we always allow two inches. We allow them to go to the center, so as to have as much to go down as to go up.

Q. And you claim now, do you, that if that engine was standing on there and these castings slipped into place, that it would go down four inches?

A. If it dropped the whole heft of that engine on it, it would go down and come up again.

154 Q. Would go down four inches?

A. Yes.

Q. And then when it got down there it would stay down?

A. No, sir; it would come up again.

Q. So that it would be necessary to take that jack down in order to take the hand out that was crushed on top of that hydraulic jack?

A. How's that?

Q. I say it would go down and it would make those springs go four inches, so that they would have to get that jack down in order to get that hand loose off from that jack?

A. Well, if the jack was clear down, it would, yes.

Q. What do you mean by that?

A. I say if the jack went clear down.

Q. You heard the testimony that the top of that jack was four and a half inches below the top of that pilot beam when this happened?

A. Yes, sir.

Q. Now, you want to tell this jury if that slipped down into place that would slip four inches, so that they would have to get that jack down lower—

A. It wouldn't have to force the truck down four inches to do it. Dropping into that center there is two inches; it would only have to go down two inches.

Q. You say it would go down two inches and hold it right down there, so that you would have to let the jack down farther?

155 A. Yes, sir.

Q. You didn't testify in that way when you testified on this trial before, did you?

Mr. Barton: You didn't ask him those questions?

A. I wasn't asked that way, I guess.

Q. You were asked that question before, to explain about these castings in the center here.

Mr. Barton: No, I dispute the question. He never was asked that question before. This is the first time. Look at the record and find out.

Q. Didn't you testify before that if those two castings were in the position I have stated and remained in that position, and this jack on the right-hand side went down, that that end of the pilot beam would be the one to go down?

A. No, sir; that wasn't the question. You asked me if that would slip in there and this jack didn't go down, if this right-hand side would go down.

Q. No, I didn't ask you anything of the kind.

A. Well, you know better than I do. I suppose you have got a better memory than I have.

Q. Suppose that casting were in the position that I have indicated, with the right edge of that male casting resting on the right

rim of the female casting, and remained there, and this jack on the right side went down, that end of the pilot beam would go down?

A. Yes, sir; they would both go down.

Q. Why would they both go down?

A. If it slipped in there?

156 Q. No, I didn't say anything about it slipping in there;

I say if it remained right there, those two castings together.

A. Yes, sir; if they remained there.

Q. Then this left-hand end would go down?

A. Yes, sir.

Q. And the right-hand end wouldn't go down at all?

A. It would go down whatever heft was on that jack, press that truck down.

Q. With the chief weight resting on this contact between these two castings?

A. What weight?

Q. All the weight except the end out here on this pilot beam.

A. How much is there out there?

Q. How much is there?

A. I don't know. I didn't jack her up.

Q. Which would be the greater weight with the bearing on these two castings with the jack out here so that the engine stood up here level?

A. It is according to how high you had her jacked up with that.

Q. So that the pilot beam was level.

A. You mean to say you set the engine out here and just set the jack under?

Q. I say with the two castings, the edges together, as I have indicated there, and the jack out under that end, and the pilot beam level, the jack then would be two inches higher than the bottom of this hole in this lower casting?

A. Yes, sure.

157 Q. Of course, if that jack went down under those circumstances, that end of the pilot beam would go down, wouldn't it?

A. They would both go down.

Q. Both go down?

A. Yes. How would you hold them up?

Q. Why, "hold them up"—the front of the boiler, part of its weight is resting on here at the time.

A. Yes, well, if you throw the rest of the weight on, the truck will go down, down on the springs; they would both go down.

Q. Go down on the springs?

A. Yes, sir.

Q. And wherever it goes down, it will stay right down there, will it?

A. Yes, sir.

Q. Go down four inches and stay there?

A. If it is heavy enough to force it down there, it would, yes.

Q. I am not asking about that; I am asking that engine as it was there?

A. The only way I can answer you is to find out what you mean here. If you had that engine jacked up clear of that center casting—

Q. I am not asking you about its being clear of that center casting; I am asking you the upper casting resting upon the edge of the lower casting there on the right-hand side?

A. The engine resting on there?

Q. Yes, sir.

A. And slipped in here?

Q. No, sir; the jack went down on that side.

158 A. The jack wouldn't be holding nothing, there wouldn't anything go down. You would have to tell me how much heft you had on the jack and how much on the truck, I could tell you how it would go.

Q. If they were standing on those castings as I indicate; assuming this is the pilot beam, one end resting on that end, and the jack sitting on that corner over there, and that jack goes down, then there wouldn't be any effect, would there?

Mr. Barton: Now, counsel is asking questions perhaps he thoroughly understands himself. If I do understand it, it is a physical impossibility for the witness to give any intelligent answer to it. He says if you have got the engine resting in the center and you have got it resting on one side, and you remove the one is it going down in the center? Now, that all depends upon how much weight you got there and the resisting power of the springs. It is with reference to testing the witness about this spring proposition. The witness has told him a time or two he would have to know how much weight there is on the center, it may be touching and not have ten pounds of weight, and it may have ten thousand pounds of weight on it, and how could the witness give any intelligent answer to it?

The Court: Oh, go on. We have had this right along. He says he knows what that engine 159 is.

Q. Now, let us see if we can get at that: Assume that that upper casting in its proper place is resting with its right edge on this upper edge of this female casting—

159 Mr. Barton: Well, how many pounds of weight are you going to put on that?

Q. —and there is a jack sitting on that end of the pilot beam so that the weight is level; distribute that weight according to your own notion; and that jack goes down, there wouldn't be any effect at all, would there?

A. No, sir.

Q. It might slip into its place, if anything; wouldn't that be true?

A. The casting would go down. The truck would go down, and the engine would go down whatever weight was on that jack. If it was equally divided it is supposed to go down one inch then, because this would be compressed down one inch with the half of the heft of the engine, and if the jack was carrying the other half, and let it down there, it would let it go down another inch.

Q. Then if it was setting in that way, with the edge of the upper casting setting on the rim of the lower casting, and it was depressed one inch, and the pilot beam was level, and that jack over there went down, the front of the engine would sag down because of those springs just one inch more?

A. If you let it down easy it would.

Q. Well, it wouldn't go down any way but easy?

A. Well, if you let it down, no, but if an engine fall down, why, it would go down.

Q. Where is it going to fall with those two castings in contact there?

A. This jack drops down and lets it go down with a rush.

Q. Where does it rush to? Those two castings are right
160 resting on each other. What do you mean by saying it would fall?

A. Why, if that jack should drop down on to it, it would let the engine come down suddenly on to it.

Q. But half is resting on those castings?

A. Yes, sir; and the other half would come down and force it down.

Q. An inch?

A. Yes, sir.

Q. So that if that happened, why, it would go down an inch below where it was?

A. Yes, if the half of the heft of the engine was setting on the truck.

Redirect examination.

By Mr. Barton:

Q. Mr. Winters, if you had those castings resting upon each other, the one on top of the other, and this jack on the left-hand side, and you didn't lower that jack on the left-hand side and didn't touch the engine by attempting to move it, could they drop into place, the two castings, the male and female?

A. No, sir; they couldn't.

By Mr. Miner:

Q. Well, that would depend upon the extent to which this male casting projected over this rim here, wouldn't it?

A. No, sir. If it projected over there a quarter of an inch it would hold it.

Q. If it was caught there very slightly and they had been
161 attempting to force it to the side in order to get it to slip in there, it might slip in there very readily, might it not?

A. No, sir; it wouldn't.

Q. You have had a lot of experience in that way?

A. Yes, sir; I have.

Q. How many times have you gone through that experience of trying to get those two castings together?

A. Oh, I couldn't name them.

Q. How many instances do you know of where it was sitting on there a sixteenth of an inch and didn't slip into place?

A. Oh, I can't recall exactly the number of times. A man with thirty-two years, I think, would have some experience.

Mr. Barton: Now, Mr. Winters, would it be possible for those two castings to go together even though they were right over each other if the jack on the left-hand side wasn't lowered?

Witness: No, sir.

Q. That would depend on how high that jack was elevated, wouldn't it?

A. Yes, sir.

Q. Do you mean to tell this jury—What was the length of that pilot beam?

A. Eight foot six.

Q. Do you mean to tell this jury that an eight foot six pilot beam there, and a jack out under this end here, if those castings came into perfect alignment, those ends wouldn't slip together?

A. By letting the one jack down?

162 Q. Yes.

A. No, sir.

Q. Do you mean to say that engine wouldn't come together?

A. No, sir; it wouldn't.

Q. That would depend on how high that jack was raised up, wouldn't it?

A. It wouldn't go down.

Q. I say it would depend on how high that jack was raised.

A. Well, it wouldn't go down on one side, it would be standing up.

Q. Do you mean to tell this jury that if a jack stood under that end of the pilot beam level with the top of that place there, the top of this lower casting just two inches above the bottom of that hole there, standing out under the end of that pilot beam, that there isn't enough play in the end of that boiler to let that slip two inches?

A. No, sir.

Q. You say that it wouldn't do that?

A. Well, I am mixed up on this a little bit.

Q. Yes, I think you are.

A. Now, here, you said about these jacks—He asked me if we had this engine jacked up and he would let one jack down, would it go in if it was lined up, and I said no. That is the way I understood the question.

Q. I am asking you my question now.

A. Well, what is this?

163 Q. Suppose this jack that you are talking about was under this end of the pilot beam, and the top of that jack was level with the surface of this female casting—

A. And no jack under the other side?

Q. Yes, sir. The jack would be how far from that center, then, to one side, if it was under the end of the pilot beam?

A. Would be four foot and three inches.

Q. Four foot and three inches, and then you tell this jury if those

were in perfect alignment, that that top casting wouldn't enter that place?

A. Oh, yes, sir; it would enter it if you had one jack under it. If you had two jacks it wouldn't enter it; that is the way I understood it.

By Mr. Barton:

Q. The bottom of the pilot beam, is it above the bottom of the upper or male casting?

A. The pilot beam?

Q. Yes.

A. No, it is just about on a level with it where they come together.

Q. That is,—as counsel has said so often here about their resting on each other,—if they were resting on each other, and the hydraulic jack was under the pilot beam, then the top of the jack would be on about a level with the top of the female or lower casting?

A. Yes, sir.

Q. Now, if you didn't lower the jack on the lefthand side any, and the engine was resting upon it, would the two castings go together?

A. How is that, now?

164 Q. Assuming that the engine has been raised up at the front end by the two hydraulic jacks, one under the right side and one under the left side—

A. Yes.

Q. —so that the engine is resting upon those two jacks, and you remove the jack on the right side and don't lower the one on the left side at all, and it remains in that position, could the two castings go together, whether they are lined up or not?

A. No, sir.

By Mr. Miner:

Q. Well, now, what are you doing, are you changing your testimony again? Do you want to retract what you said a few minutes ago?

Mr. Barton: Well, if you will ask intelligent questions he will not—

Mr. Miner: Well, he is dense enough, but I think he will understand what I am asking him. Any time he complains, why, I will try and make it plainer.

Q. I understood you to say that if we had a jack standing out under this pilot beam (and the top of that jack was just level with the top of this rim of this female casting, and those two castings came into perfect alignment, the male would drop into place there.

A. Yes, sir; if you let the jack down.

Q. Do you mean to say with one jack under the pilot beam some four feet six inches from the center, and the top of the jack level with the surface of this lower casting, that those castings wouldn't come together if they were in alignment?

165 A. Yes, sir; if there was one on the opposite side and you didn't let it down, you wouldn't let the engine down.

Q. I am not speaking of two jacks; I am speaking of one.

A. He is speaking of two.

Q. No, he is speaking of one; he is asking you if one jack was setting out four and a half feet from the center, if the top of that female casting would prevent those two castings coming together if they come in alignment?

A. You asked me if you jack until they come up level with the top of them, a jack on each side, and you let one jack down, would the castings go together, and I said no, not unless you let the other jack down.

Q. Well, you mean to tell this jury, then, that if those——

A. Now, you want to put one jack under and let it down. If it is in the center, why it will go in.

Q. I am not asking you that at all.

A. What are you asking?

Q. I am asking you if you want to tell this jury that with a hydraulic jack standing under the end of the pilot beam, the top of it level with the top of this female casting, the rim of it here, that if these two castings were in alignment, because the end of that pilot beam was resting on that jack four and a half feet from that center, that those castings wouldn't come together?

A. What would make them come together?

Q. Why, the weight of the engine, of course.

166 A. Well, the jack is holding the weight, ain't it?

Q. You don't mean to tell this jury that that engine boiler is rigid there and won't sway from side to side?

A. Yes, sir; when you have her jacked up it is just as rigid as that is right there. You put two jacks and hold it, one under there, how are you going to let it down? It is stationary. That is the way with an engine.

Q. But if you have a jack here and let it down?

A. Well, only one jack under it, and you let it down, of course it will. That is what I am trying to tell you.

Q. That is what I understood you to say, and then, as I understood it, you contradicted it.

Mr. Barton: He said it wouldn't go down.

Mr. Miner: Now, you don't understand his evidence at all.

Mr. Barton: Well, if you do, why, then you do more than I think.

By Mr. Barton:

Q. Mr. Winters, what did that engine consist of—that is, now, bearing in mind that the tender has been taken away from it and we are talking about the engine proper, what did that consist of?

A. Why, consisted of the entire engine, I suppose.

Q. Well, I want you to tell me what the entire engine is.

167 A. Well, it is a boiler and engine trucks, cylinders, frames and driving-wheels, driving-rods, springs, cab,—the whole engine.

Q. The cab?

A. Yes.

Q. What about the fire-box?

A. Fire-box, smoke-stack and front end, and pilot.

Q. What was the size of the boiler on that engine?

A. Well, I think it is about a thirty-six-inch boiler; I don't know the exact size of the boilers, I ain't no boilermaker.

Q. You say you think about thirty-six inches; what do you mean by that—in diameter?

A. Yes, sir.

Q. And what was the length of it?

A. Oh, I suppose the boiler proper is about eighteen feet, eighteen, nineteen, something.

Q. Now, how is that boiler constructed? What is it made out of?

A. Made out of boiler iron or boiler steel.

Q. And what does it hold?

A. Holds water,—flues.

Q. How many of them?

A. Something like over 200, I guess.

Q. How many?

A. A little over 200, I think.

Q. A little over 200 flues?

A. Or three.

Q. Now, where are those flues?

A. They run from the front end of the engine to the front end of the fire-box.

Q. And what is there in those flues when you are using
168 the engine?

A. There is fire in there.

Q. The smoke-stack is at the front end of the engine, is it not?

A. Yes, sir.

Q. The fire is at the rear end?

A. Yes, sir.

Q. And the fire and smoke go through those flues?

A. Yes, sir.

Q. And there is water all around the flues?

A. Yes, sir.

Q. You have to have it water-tight, then?

A. Yes, sir.

Q. Now, what is there at the rear end, then, of the boiler proper now, I mean?

A. The fire-box there.

Q. And how large is the fire-box?

A. I don't know the exact dimensions of these boilers, because I never had anything to do with the boiler part of them.

Q. Well, about how large is the fire-box?

A. But it has what we call a wagon top on it that, I suppose, is about eight to ten inches, perhaps, higher than the other part of the boiler.

Q. Yes?

A. And then it runs down, straight down instead of rounding, and I think them fire-boxes is something like six foot long, I ain't sure, I am just guessing at these sizes of them,

Q. And how high?

169 A. Well, I can stand up in them readily, inside of them.
Q. Inside of the fire-box?

A. Yes.

Q. Now, the cab is about how large?

A. Well, it sets clear on the outside of the boiler. I suppose it is about eight foot wide, I should judge; it is about as wide as——

Q. Which is the heaviest end of the engine, the rear or the front?

A. The hind end.

Q. How much difference would there be between the hind end or rear end and the front end, in weight? That is, give it approximately, if you can?

A. Well, I don't know; I couldn't say. I did weigh the engine at one time, but I forgot.

Q. Well, is the rear end a good deal heavier than the front?

A. Yes, sir.

Q. Now, you have spoken about the wagon top over the fire-box; what is there in that?

A. Well, there is a fire-box inside of that outside shell, there is another fire-box in there, it is held in by staples.

Q. Is there water over the fire-box?

A. Yes, sir; over the top of it.

Q. Do the flues come clean to the rear end of that wagon top?

A. No, sir; they just come to the front end.

Q. But the water that circulates around the flues does that circulate around the fire-box also?

A. Inside of the fire-box, the water circulates on the outside of the fire-box proper.

170 Q. Well, that is what I am asking.

A. There is a space of three inches, or something like that.

Q. Both on the top and on the sides of the firebox?

A. Yes, sir. Well, the top has about eighteen inches, I should judge, the highest part of the space, above the crown-sheet.

Q. Then that all has to be watertight?

A. Yes, sir.

Q. You were asked by counsel about springs; how many of those springs are there under the front end of the engine?

A. One on each side.

Mr. Barton: Counsel says defendant's Exhibit 2 is in evidence; if it isn't I want to offer it in evidence.

Mr. Miner: That and the drawing, put them both in.

Mr. Barton: Very well, they are considered in evidence, then, anyway, the photograph and the drawing, and at this time I offer in evidence plaintiff's Exhibits A, B and C, and the casting that lies on the floor here I want to offer in evidence also.

The Court: Received without objection.

Q. This photograph, Exhibit 2, that your attention has been called to, shows the top part of the trucks under the front of the engine in question; you recognize it as such, do you?

A. Yes, sir.

Q. Now, you have spoken of springs; where are those
171 springs? Can you point them out on this Exhibit 2?

A. The way the picture is taken you can't. It don't show the springs. But this here is an equalizer, it goes on top of this box here on each side, like that, and two pieces, and it comes back here. They haven't got the wheels here that you can see. This spring sets in between, right in here, the two hangers. This truck sets, the center of it, right down on both springs, and this works up and down, this whole thing, on the spring.

Q. So that the springs that you refer to is one on either side of the trucks?

A. Yes, sir.

Q. And between the two wheels on each side?

A. Yes, sir.

By Mr. Miner:

Q. How many springs are there on the rear of the engine?

A. There is four.

Q. Where are they located?

A. One on the front driver and one on the back, on each side.

Q. What are they for?

A. To hold the engine up. She rides on springs altogether.

Q. Yes, and that permits the go and come of the engine from side to side?

A. Yes, up and down and sideways, every way.

Mr. Barton: If the rear part of the engine was resting on hydraulic jacks, those springs under the rear portion wouldn't cut any figure, would they?

Witness: No, sir; not if she was jacked up.

172 Mr. Barton: I desire to read the testimony of Dr. Bacon on the other trial. It is agreed by counsel that we may use it rather than call the doctor in again.

DR. KNOX BACON, sworn on behalf of plaintiff, testified:

By Mr. Barton:

Q. What is your profession, Doctor?

A. I practice surgery.

Q. How long have you been practicing?

A. Nearly twenty years.

Q. Where?

A. In this city.

Q. A duly licensed physician and surgeon of this state?

A. I am.

Q. Making a specialty of surgery?

A. For a great many years.

Q. Have you examined the plaintiff's hand in this case?

A. I have.

Q. When?

A. This morning.

Q. Which hand do you refer to?

A. The left hand and wrist and arm.

Q. Now, tell the court and jury what you found with reference to that hand and wrist.

A. The first thing noticeable upon inspection of this boy's injured member is the loss of the entire little finger. There remain upon the hand still the first, second and third fingers, which are held in a deformed position in that they assume a claw-like character, being bent in toward the palm of the hand. The knuckle and terminal joints of the second and third fingers are partially stiffened, the fingers can't be opened, that is, extended as we do when we straighten out our hand and fingers; neither can they be any further flexed or drawn into the palm of the hand. The knuckle joint of the index fingers has a fair amount of motion. There is a little more motion in the terminal joint of the index finger, but the man has no ability to open the index finger; it has a little more power of flexion, that is, being drawn in toward the palm. The thumb is in a somewhat straightened position, which we know as extension with a little power of flexion or drawing in toward the palm of the hand. The condition is permanent. There is a condition of anæsthesia or paralysis of feeling existing over the entire third finger. There is no sense of pain to the prick of a pin, and the same condition exists upon most of the middle finger. He can perceive pressure upon the ring finger and upon the middle finger, which we know as muscle sense, but it isn't a skin activity. The hand itself is seriously scarred, both upon the back and upon its palm large scars exist. The bones of the hand are fixed and entirely immovable. The hand is in a condition of flexion, that is, being drawn downward. The wrist joint is entirely fixed and immovable and will never move again. And I now come to refer to the scar upon the forearm, which on its under or palmar surface is a little above the wrist joint, where an abscess at some time had
174 taken place. The circulation of this hand and fingers is bad, sensitive to changes of temperature, and will be so. I think that covers the situation of that hand.

Q. What is your opinion with reference to these conditions that you have described being permanent or not?

A. The condition is a permanent one; it can't be changed.

Q. Can you give us a little more definite idea as to the extent of flexion of the hand at the wrist joint, how much is it out of—

A. About fifty per cent.

Q. And it is inward?

A. Yes.

Q. Did I understand you to say that the wrist joint is entirely gone?

A. It is, yes; destroyed.

Q. What about the bones that form the palm of the hand, were you about to discover whether they are all there, and if so, in what position as compared with the normal hand?

A. Well, he has the bones of the first, second and third finger in there belonging to the hand, but they have been injured through this

crushing and through infection which took place, the blood poisoning that existed in that hand and has destroyed all of its relations in the bony structures and soft structures or fleshy structures. There may be some fragments of bone gone out of the hand, I couldn't tell that.

Q. As compared with the other hand what is the size of the
175 left hand, the palm part of the left hand?

A. Oh, I should think lacking about one-quarter, or a part corresponding to what would be drawing a line from between the ring and fourth finger directly downward toward the wrist, cutting that off, that would about represent the balance of his hand.

No cross examination.

Plaintiff rests.

Mr. Miner: At this time, if the court please, I desire to move the court to dismiss this action for the reason that upon the state of the proof at the close of plaintiff's testimony no negligence on the part of the defendant has been shown as the proximate cause of the injury which the plaintiff sustained; that the state of the proof at the close of this trial so far as the plaintiff is concerned, is no different than it was at the close of the former trial, and the Supreme Court of this state, upon the state of the proof at that trial, as I understand it, held that it did not appear from such proof that the use of the open-ended wrench was the cause of the injury to plaintiff. And if that was the condition at the close of the evidence on the other trial, I don't see that that condition has been changed at all by the evidence in this trial. Also, upon the further ground that it appears incontestably here that the plaintiff assumed the risk of the exact consequence that came from his act. His testimony is that he

fully appreciated that if the engine came down his hand
176 would be crushed; that he knew that when he put his hand in to shove the block off from the top of the jack, and that he comprehended that the engine, if it came into place, would necessarily catch his hand by the coming down of the pilot beam, and that it would crush it. I say that it was a perfectly obvious danger, and the plaintiff says that he comprehended it, and he assumed, in the law, the very consequences occurring. Your Honor, I think, is familiar with the decision in the federal court; they held that under the federal act upon which this cause is predicated, that the defense of assumption of risk is still available to the same extent and in the same way as construed by the federal courts prior to the adoption of that act. And upon the further ground that the plaintiff was guilty of contributory negligence and that that negligence, that want of care upon his part, was a contributing and proximate cause of the injury which he received.

Mr. Barton: Counsel has not correctly stated the situation. He says the evidence now is the same as it was before; that is entirely wrong. The witness Lang and the witness Martin were not witnesses upon the trial of the other case at all. The other witnesses were. The witness Lang and the witness Martin testified that the jack was down on the left-hand side after the accident, and that is the point

which the Supreme Court had in mind. Their opinion shows that they said they weren't satisfied with the evidence before that that had gone down. Now, we have got the two witnesses saying it was down.

177 The Court: The motion will be denied at present.

L. S. HELGERSON, sworn on behalf of defendant, testified:

By Mr. Miner:

Q. Mr. Helgeson, you reside in Oskaloosa, Iowa?

A. Yes, sir.

Q. And you are in the employ of the defendant railroad company, are you?

A. Yes, sir.

Q. In what capacity?

A. Claims adjuster.

Q. And as such claims adjuster do you have to do with the investigation of claims that are made against the defendant railroad company arising out of personal injuries?

A. Yes, sir.

Q. You are familiar with the testimony that has been given in this case, Mr. Helgeson?

A. Yes, sir.

Q. Were you familiar with the engine No. 159 on which the plaintiff was working at the time the injury was received?

A. I know the engine.

Q. I will ask you whether or not after the injury was received you conducted a series of experiments with reference to that engine and the operation of the hydraulic jack which young Larson was using in the manner in which he was using it at the time the accident occurred?

A. Yes, sir.

178 Q. I wish you would describe to the jury just what was done?

Objected to as incompetent, irrelevant, immaterial and no sufficient foundation laid.

The Court: What do you intend to show, Mr. Miner,—that they took these machines and experimented with them, or what?

Mr. Miner: That they took this engine 159 and took this hydraulic jack and put it under the end of the pilot beam, and the purpose is to show the effect of raising the corner of the pilot beam up, as they claim that it was raised up, and leaving this open-ended wrench in there, as they claim it was left there.

The Court: Well, if counsel objects to it I don't believe it is proper unless it is shown that it is absolutely the same condition.

Q. Do you know whether or not that engine No. 159 was in the same position and condition at the time this test was made that it was in at the time Mr. Winters was hurt?

A. In the same condition.

Q. Do you know whether or not the jack that was used with which the experiment was made was the same jack in the same condition as when Mr. Winters was hurt?

A. Well, it was the same jack. Of course, I am not an expert on a jack, I couldn't testify as to the conditions of the jack.

Q. It was the same hydraulic jack?

A. The same hydraulic jack.

179 Q. And do you know whether or not the open-ended wrench that was used in the experiment that was made is the same open-ended wrench that is now in court?

A. Yes, sir.

Q. That was used on the former trial of this action?

A. Yes, sir; it was.

Q. And was the jack placed under the front end of the locomotive, under the pilot beam, in the same position as described by young Larson in his testimony on the last trial?

A. It was.

Q. And was the jack elevated in the same way as was described by young Larson in his testimony upon the trial in the last trial of this case?

A. Yes, sir.

Mr. Miner: Now, if the court please, I offer to prove by this witness that under those circumstances with the same engine and the same condition, the same jack and the same open-ended wrench, that the corner of the pilot beam was raised up by force of the hydraulic jack exactly as was done, by young Larson, and that the open-ended wrench was left in the jack for the purpose of determining the question as to whether or not under those circumstances the head of the jack would be caused to go down by means of the open-ended wrench being left in there, and offer to show that the test showed that the open-ended wrench would not go down, and that it required the application of I think something like 160 pounds of weight attached to the end of the open-ended wrench before it could be forced down low enough to cause the jack to trip.

180 Mr. Barton: Before I make my objection I want to ask the witness a few questions, your Honor.

The Court: Yes.

By Mr. Barton:

Q. Where is your home?

A. Oskaloosa, Iowa.

Q. You were not present at the time of this accident?

A. No, sir.

Q. Where were you on that date?

A. I was in Marshalltown the morning following the accident. I couldn't say, Mr. Barton, where I was the date of the accident.

Q. Then you know nothing about the jacks that had been used under that engine excepting what was told you?

A. This jack was set aside, Mr. Barton.

Q. Well, did you set it aside, Mr. Helgeson?

A. No, sir; I didn't.

Q. Well, then, you don't know anything about that?

A. I don't, except it was set aside as being the jack.

Q. Well, as some person told you?

A. Yes, sir.

Q. That is all you know about it?

A. Yes, sir.

Q. It was pointed out to you by some person?

A. Yes, sir.

181 Q. How it got there you don't know of your own knowledge anything about it?

A. No, sir.

Q. Nor you don't know anything about what had been done with the jack during the period of time elapsing from the time of the accident until the next day?

A. No, sir.

By Mr. Miner:

Q. You know it was the jack used on the other trial, do you not?

A. The jack used on the other trial.

Q. And the same jack that is now in court?

A. The same jack that is now in court.

By Mr. Barton:

Q. But you weren't present on the other trial?

A. Yes, sir.

Q. You were in court here during the whole trial?

A. I have been here each day.

Q. You know everything that was said and done on the other trial?

A. I don't pretend to know everything, no.

Q. Well, you were in court all the time?

A. Yes, sir.

Q. Sitting beside Mr. Miner?

A. Back of him, I believe.

Q. Yes, prompting him along the trial?

A. No, sir.

Q. You made suggestions to him?

A. Certainly.

Q. Do you recollect this taking place at the close of the trial: "Mr. Miner: So far as I knew, if the court please, the court and the jury are in possession of all the facts so far as we know them. Defendant rests." And you weren't called as a witness, nor no one else called as a witness by the defendant; ain't that true?

A. That is true.

Mr. Barton: This evidence is objected to as incompetent, irrelevant, immaterial and no sufficient foundation laid for it.

Recess until 2 P. M.

The Court: The objection to this testimony is sustained.

Exception by defendant.

By Mr. Miner:

Q. Mr. Helgerson, is it possible by taking a chain and putting it around this hydraulic jack which stands in court here, with a block on top, to demonstrate before this jury whether or not by the use of that open-ended wrench the jack, after being elevated taut against the pressure above will go down or not?

A. Yes, sir.

Mr. Barton: That is objected to as incompetent, irrelevant, immaterial, no sufficient foundation laid for the witness giving any opinion of that kind.

Mr. Miner: The statement has been made right here in court, if your Honor please, that with that open-ended wrench in that hydraulic jack setting there, with the pressure on top, will go down of its own weight. Now, we propose to show, make a demonstration, that the jack will stand there with the open-ended wrench in it and will not go down.

183 Mr. Barton: Now, if the court please, no witness has testified to what counsel has said. There is no evidence that this is the jack; it has been identified as similar; we deny that it is the jack most forcibly.

Mr. Miner: Well, that is the assertion of counsel; that ain't proof.

The Court: Oh, well, I don't know. This has been used as the original jack.

Mr. Barton: Oh, no, no, no.

Mr. Miner: And has been put in testimony as the evidence of the plaintiff.

Mr. Barton: No, it has been used as a sample. We demanded the production of the original.

The Court: Oh, it has been used as practically the same jack.

Objection overruled.

Q. Mr. Helgerson, will you make the arrangement there and show—

Mr. Barton: Now, I would like to ask this witness some questions on cross examination here before this is permitted.

The Court: Go ahead.

By Mr. Barton:

Q. Mr. Melgerson, are you a machinist?

A. No, sir.

Q. Do you know anything about the construction of this hydraulic jack?

A. No, sir.

Q. Do you know how that hydraulic jack got here into court?

A. Yes, sir.

Q. Who brought it here?

184 A. I brought it here.

Q. Where did you get it?

A. Marshalltown, Iowa.

Q. Do you know that this jack had been worked with and changed by the machinists down there within the last month?

A. No, sir.

Q. You don't know anything about that?

A. No, sir.

Q. Did you see what was done with this jack in the shops down there at Marshalltown during the last month?

Mr. Miner: I object to that as assuming something that is not in proof.

The Court: He says he doesn't know what has been done.

Q. You were present in court during the last trial of this case, you said?

A. Yes, sir.

Q. Do you recall seeing the jack that was in court then go down when that wrench was left in it?

A. No weight on it, yes.

Q. It did go down?

A. Yes, sir.

Q. Tripped itself; ain't that right?

A. Now, let's see. I think so, as I remember it.

By Mr. Miner:

Q. But there was no weight on the jack?

A. No weight on the jack.

Q. Now, will you make the arrangement there and show the fact?

185 Mr. Barton: That is objected to as incompetent, irrelevant, immaterial, and no sufficient foundation laid.

The Court: I may be mistaken, but I understand you want to put this handle or whatever you call it, into that jack; is that it?

Mr. Miner: Yes, sir, with the pressure above, and raise the top of the jack up against that pressure and then leave the open-ended wrench there and show that it won't go down against that pressure.

Mr. Barton: Now, the witness says it did go down before.

Mr. Miner: Not with pressure before. Of course it will go down without anything on top of the jack.

The Court: You may try it.

Exception by plaintiff.

Witness steps down, puts a block across the jack and fastens chain around base of jack and over block, then raises jack taut against the pressure and allows the open-ended wrench to remain in the jack.

Mr. Barton: You wouldn't expect it to go down when the lever is caught on the other side, would you?

Witness: I will remove the lever (witness releases handle).

Q. Now, Mr. Helgersen, are you familiar with the location and interior arrangement of the roundhouse of the defendant at Marshalltown, Iowa?

A. Yes, sir.

186 Q. I show you here a drawing marked Defendant's Exhibit 1, and ask you if you recognize that as a drawing of the end of the roundhouse at Marshalltown?

A. Yes, sir.

Q. Showing the first four tracks in that roundhouse?

A. Yes, sir.

Q. Now, I will ask you (showing you Defendant's Exhibit 3) whether or not that is a photograph of engine 422?

A. Yes, sir.

Q. I will ask you whether or not you saw that engine placed on track 3, as shown on that diagram?

A. On the third track from the fire-wall or center wall.

Q. On the third track from the fire-wall?

A. Yes, sir.

Q. Between the roundhouse and the annex, that being the first track east of the track on which the engine stood that Winters was working on at the time of his injury?

A. Yes, sir.

Q. I will ask you as to whether or not, with that engine so standing on that track, you made some observations to determine whether or not a person located at any point within ten feet of the south end of the pit, on that track, could look through that engine and see a jack standing nearly opposite the pose that is shown on this diagram by the track on which Winters was working on the day he got hurt?

187 A. No, sir; they could not.

Q. Did you make an observation to determine that fact?

A. Yes, sir.

Q. Tell the jury, please, what observation you made and what the effect was. That is, what the result was.

A. I went down in the pit back under the cab, and it was necessary to stoop very low all the way through. I tried to look out from between the spindles and under the wheels, between the wheels, and on account of the angle up there it is impossible to see.

Q. With the smoke-stack on the engine represented in the photograph before you under the hood, where the engines are intended to stand when in the roundhouse, where would the front drivers of that engine be with reference to the pit here?

A. Two front drivers would be to the head of the pit.

Q. That is, towards the south wall?

A. Towards the south.

Q. Towards the front end of the engine?

A. Yes, sir.

Q. Towards the end of the engine on which Winters was working?

A. Yes, sir.

Q. Would there be any open space in the first ten feet of that pit to the south that wouldn't be interfered with by these drive-wheels?

A. No, sir.

188 Q. All of that space, then, as I understand you, would be taken up by the drive-wheels of that engine?

A. The two rear drive-wheels.

Q. And the drive-wheels would extend even to the south of the end of the pit?

A. Yes, about the same distance.

Q. State whether or not it would be possible with that engine standing in that position, for anybody to be sitting on the side of the pit to the east, looking to the west.

A. There wouldn't be room; they couldn't sit there.

Q. I call your attention to Plaintiff's Exhibit E, being a casting upon the floor here which has been spoken of as the male casting, do you know whether or not that is the male casting that was on engine 159 on which Mr. Winters was working?

A. Yes, sir.

Q. I show you a photograph marked Defendant's Exhibit 2, being the photograph of what is termed a female casting, and a part of a truck, and ask you to tell the jury what that is?

A. That is the female casting which was on engine 159.

Q. And as I understand you, that is a photograph of the casting which went with this casting in court?

A. Yes, sir.

Q. And that they were the castings, male and female, that were on engine 159 upon which Mr. Winters was working?

A. Yes, sir.

189 Cross-examination.

By Mr. Barton:

Q. How long have you been a claim agent for the M. & St. L. railroad?

A. Since the 1st of January, 1910.

Q. What were you doing before that?

A. 1911, I should say. I attended college out here at Minnesota.

Q. Never was a machinist?

A. No, sir.

Q. You say you brought this jack into court?

A. Well, I brought it from the depot; had it billed up here and brought it from the depot up here.

Q. Did you have anything to do with its shipment down at Marshalltown?

A. Yes, sir.

Q. When?

A. Well, it is three times now I brought it up here.

Q. Well, this last time?

A. Let's see. Last week, last Wednesday, I believe it was.

Q. You say you did have to do with its shipment down there?

A. Yes, sir.

Q. Where did you get it down there?

A. In the shop.

Q. What part of the shop?

A. In the back shop.

Q. Was it in the oily condition when you got it that it is now?

190 A. Well, they are always oily that way, yes.

Q. Well, I am asking you now this question?

A. Yes.

Q. Was it leaking oil at that time?

A. Well, there was oil on it.

Q. How is that?

A. There was oil on it.

Q. Well, you see it is leaking oil here; was it leaking at that time?

A. Yes, there was oil on it.

Q. Well, was it running out on the floor where it stood?

A. I think there was some oil around there, I didn't pay any particular attention to it, Mr. Barton.

Q. Did you see that there had been work done on this jack before it was brought up here this time?

A. No, sir.

Q. Do you know who did the filing on this wrench B, the one with the lug on the side?

A. I do not.

Q. Was it done here since it came here, or was it done before?

A. I don't know when it was done. It was done when the wrench got here.

Q. Well, you noticed that it was freshly filed?

A. It has been emiered; that is what it has been.

Q. Well, what is the difference between emerying it and filing it?

A. About the same thing, Mr. Barton.

191 Q. You have taken off some of it so as to make it fit in this jack?

A. I didn't take any off.

Q. Well, it has been done?

A. It has been done, yes.

Q. And it has been recently done?

A. Yes, yes.

Q. Were you present when it was done?

A. No, sir.

Q. This photograph Exhibit 3, do you know when it was taken?

A. Well, it was taken very soon after the deposition which you took—Mr. Lang's deposition, in Marshalltown.

Q. You say this photograph was taken after Mr. Lang's deposition was taken. Did you yourself have a talk with Mr. Lang, along either shortly before or shortly after his deposition was taken?

A. No, sir.

Q. Were you present when he was talked to?

A. No, sir.

Q. Were you present when one Mitchell was talking to Lang's brother-in-law, Mr. Gribbenhauer?

A. No, sir.

Q. You know who Mr. Gribbenhauer is?

A. Gribbenhauer?

Q. Yes.

A. I don't know the name. Gribbenbar, do you mean? Yes, I know Mr. Gribbenbar.

Q. Well, were you present when Mr. Mitchell was talking to him?

192

A. No, sir.

Q. Did you talk to Mr. Lang yourself at all?

A. No, I never talked to him at all.

Q. Were you present when this photograph was taken?

A. Yes, sir.

Q. This engine was where at that time?

A. It was on the third track from the fire-wall in the building.

Q. In the roundhouse?

A. In the roundhouse.

Q. Is it standing over a pit?

A. Yes, sir.

Q. Will you please come down this way? (Witness steps down before jury.) I am pointing to near the center of this photograph and to a place just in front of the second driving-wheel from the left of the photograph; is that an open place you see under the boiler of that locomotive?

A. Yes, sir.

Q. In looking through there you are seeing something beyond this locomotive?

A. Yes, sir.

Q. That is also true in the other light place just to the left of where I was pointing, is it not?

A. Yes, sir.

Q. That light place indicates that there is a free view through to the other side of the locomotive?

A. Straight across there.

Q. Now, is it not true that between the spokes of these driving-wheels you can see through beyond the engine?

193 A. Straight across you can.

Q. Certainly. If a man was under the engine he would only have to look through one driving-wheel?

A. Yes, sir.

Q. But he could be on the side of the engine and look through both driving-wheels?

A. Straight across he can.

Q. Certainly. And between the driving-wheels there is a larger open space, even?

A. There is an open space except where the brakes and the side rods obstruct.

Q. But above the brakes there is considerable of an open space, between the front driving-wheels—

A. No, that is all solid iron right straight down to there (indicating). The front trucks are all in here, you see.

Q. But between the middle driving-wheels there is considerable open space?

A. There is an open space up next to the boiler; down below here it is all rods, all solid rods, from there within about ten inches of the rail.

Q. You think it comes down to about ten inches of the rail, then below that it is all open?

A. It is open below. Well, some places it runs down to six inches. Down in here it is about six inches.

Q. Do you know the height of those driving-wheels?

194 A. I think they are about eight feet, something like that; I wouldn't be positive—seven feet, probably.

Witness resumes stand.

Q. It is a part of your duties to get evidence to defend these lawsuits with?

A. I investigate all cases down there.

Q. Furnish evidence?

A. I investigate——

Mr. Miner: I object to that remark as improper.

The Court: The word "furnish" probably is improper.

Q. You look up the witnesses and bring them before the lawyers?

A. Yes, sir.

Q. And you question them before you do it?

A. I take statements from them.

Q. If they are all right on your side, why, you bring them, if they are not, you leave them alone?

A. No, sir.

Q. Do you ever bring a witness who is against you to your lawyer?

A. I try to get all the evidence I can get and enclose it all in the file and hand it over to the legal department.

Q. Well, did you ever bring a witness to counsel in these cases that was a witness that was against you?

A. Lots of times.

Q. Did you ever hear them examined in court?

A. Yes, sir.

Q. Who were against you?

A. Yes, sir; I have.

195 Q. Tell us a case?

A. Well, we had a case down in Nevada once, I remember one case especially, Mr. Miner——

Q. Where you furnished the other side with evidence?

A. That is what is amounted to.

Mr. Miner: Yes, he did; I can testify to that, because I was there.

Q. Well, you didn't mean to do it, I suppose (laughing).

Redirect examination.

By Mr. Miner:

Q. Now, this handle here, Mr. Helgersen,—I don't know anything about these handles—is there any difference between the handles that are used in the operation of these jacks?

A. The handles are all practically the same.

Q. Made in the same manner?

A. The same size.

Q. Same lugs?

A. Yes, practically so.

Q. What is the fact as to the size of this opening on the side of the jack by which the jack is operated?

A. They are uniform also—should be.

Q. So that, as I understand you, one of these handles will operate any one of the hydraulic jacks used?

A. Quite often the handles get jammed and dented.

Q. And what is the fact as to whether they will get rusty?

196 A. They get rusty and they will also get jammed.

Q. Now, counsel has called your attention to these openings here between the drive-wheels on this engine, and as I understood you to say, it is true that standing on one side of the engine you can look straight through?

A. Yes, sir.

Q. But what is the fact as to whether or not standing on one side you could look at an angle through on the other side and see an object that was to the right or the left of the space between the wheels?

A. Well, to a slight angle you could, but not to any great degree.

Q. And what is the fact as to whether or not standing along any of those open spaces as shown here in this photograph, with this jack standing on the track, whether there would be sufficient room there for you to look at an angle through and see that jack?

A. No, sir.

Q. From the other side of the engine?

A. No. I tried every one of them all the way through, and couldn't do it.

FRANK A. HOPPE, sworn on behalf of defendant, testified:

By Mr. Miner:

Q. Mr. Hoppe, you live in Marshalltown, Iowa?

A. I do.

Q. Were you living there in 1912?

A. Yes, sir.

197 Q. And working for the Minneapolis & St. Louis Railroad Company?

A. I was.

Q. You were working there, were you, at the time that Mr. Winters was hurt, got his hand crushed?

A. Yes, sir.

Q. And what was your business?

A. Machinist.

Q. Was Mr. Lang, who has testified here, your helper?

A. Mr. Joe Lang; yes, sir.

Q. Now, you remember the day, do you, when Mr. Winters received this injury, his hand was crushed?

A. I do.

Q. You are familiar with the roundhouse there at Marshalltown, Mr. Hoppe, are you?

A. I am.

Q. This diagram which I show you here, marked defendant's Exhibit 1, is a drawing of the four tracks and pits near the west end of the roundhouse; the line that I show you here and point to now is the wall between the roundhouse proper and what is termed the annex. I don't know how the tracks are numbered in the roundhouse, but these are the four on the west end of the roundhouse. Now, it is in testimony here that the engine that Mr. Winter was working on was standing on the second track shown on this diagram from this wall which is marked the annex wall; you remember, do you, that it was on that track?

198 A. Yes, sir.

Q. Now, what engine was standing, if any, on the track next east of that track?

A. It was one of the large class of engines they have there.

Q. Was it engine four twenty—

A. Four twenty-two.

Q. I show you a photograph that is marked defendant's Exhibit 3 and ask you if that is a photograph of the engine that was standing on that track at that time?

A. That is the same class engine.

Q. That is the same class of an engine?

A. I couldn't tell you whether—

Q. You can't see the number, but it was an engine of that class and kind?

A. Yes, sir.

Q. Now, what was standing on the track next east, being the fourth track from the wall between the roundhouse and the annex?

A. Well, there was a smaller engine on that track.

Q. How did that engine compare with the engine that Mr. Winter was working on, as to size?

A. Well, it was a little larger than that.

Q. And what is the fact as to whether or not the front trucks of that engine standing on the fourth track were in place or out of place?

A. They were out from under the engine.

Q. Now, just at the time that the accident happened where were you?

199 A. I was down in the pit under this large engine.

Q. Do you know anything about where Mr. Lang was?

A. I couldn't tell you where he was.

Q. Do you know where he was?

A. On the outside somewhere; I couldn't see.

Q. Mr. Lang has testified that at some time—I don't remember when—you and Mr. Winters, Sr., here, and he were together and were talking about this case, and that you asked if young Mr. Winters had ever yet received anything for his injury, and Mr. Winters said no, and that you replied that you couldn't see why he shouldn't,

because you and Joe both saw the accident; tell the jury whether or not that is correct?

Objected to as incompetent, irrelevant and immaterial, and leading.

The testimony of Mr. Lang was referred to and the following question and answer read to the witness: "Q. Well, how did anybody guess that you knew anything about it, then? A. I and Mr. Winters and Hoppe, we was standing together and talking about this case—that is, Hoppe and Mr. Winters was talking, I wasn't saying anything. And Mr. Winters,—Hoppe, I should say, he asked Mr. Winters about the case, if he ever got any money out of it yet, and Mr. Winters says no, and Mr. Hoppe says, 'It's funny,' he says, 'that he wouldn't get anything, as bad as his hand is crippled up. I and Joe seen it, we seen it, Joe specially, he was sitting there and seen it.'"

Q. Now, did you ever have any such conversation, Mr. Hoppe?

A. I don't remember of talking in that matter, but we were talking about the case at several different times around the round-house, and the accident happened there, and once in a while you could hear the fellows talking about it, but I never paid no attention.

Q. Well, did you make the statement in the presence of Mr. Winters and Mr. Lang that you and he saw the accident?

A. I did not, because I didn't see it.

Q. You made no such statement?

A. No, sir.

Q. When did you first notice that Mr. Lang claimed to know anything about the accident?

A. Why, here last week.

Q. And you never had heard or understood up to that time—or had you—that he knew anything about it?

A. No.

Q. And the accident happened in 1912?

A. Yes, sir.

Q. That was the first that you knew of it, was it, Mr. Hoppe?

A. Yes, sir.

Cross-examination.

By Mr. Barton:

Q. You say you have talked to Mr. Winters a number of times about the young man's getting hurt?

A. Yes, sir.

Q. You knew the day that he did get hurt?

201 A. Yes, sir.

Q. Did you go over to where he was hurt?

A. I did.

Q. Did you do anything with the jacks?

A. I did not.

Q. Did you touch either jack?

A. No, sir.

- Q. Did you see Lang around there?
A. I did.
Q. Where was Lang when you first saw him after the accident?
A. Standing right ahead of me.
Q. How is that?
A. He was standing right ahead of me.
Q. Right ahead of you?
A. Yes, sir; he got there first and I come up behind him.
Q. Oh, Lang got there first, and you came up behind him?
A. Yes, sir.
Q. Now, where was Winters at that time?
A. The boy?
Q. Yes.
A. Why, he still had his hand on the jack.
Q. Still fastened on the jack?
A. When I got there the jack was loose, just was letting it down, and I was there when he took his hand out.
Q. And Lang got to the place first?
A. Yes, sir.
Q. Now, who else was around there?
A. Why, there was Dode Conn, I saw him there, and two
202 or three of the young fellows, helpers there, I don't remember who they were.
Q. Now, in order to get to where Winters was you had to pass along in front of the engine?
A. Yes, sir.
Q. That Winters was working on?
A. Had to pass around it, around the front end of it.
Q. You say you were under your engine at the time the thing happened?
A. Yes, sir.
Q. And what directed your attention to the fact that something had gone wrong?
A. I heard a report.
Q. How is that?
A. I heard a noise, a loud report of this casting going into place.
Q. And you were on the fourth, or which pit from the west?
A. Right next to the engine, the first on the other side, west side.
Q. You were under an engine which stood on the pit to the left of Winters' engine?
A. Yes, sir.
Q. And you say you were down in the pit?
A. Yes, sir.
Q. Do you recollect whether you had your back towards Winters' engine or not?
A. I do not.
Q. You don't recollect your position at all?
A. I was just ready to get out of the pit when I heard the report.
203 Q. Which side were you going to get out on, the side Winters' engine was on—

A. Yes, sir.

Q. —or on the other side?

A. The right side.

Q. You were under what part of your engine?

A. Under the rear drive-wheel, the back end.

Q. That would be the drive-wheels farthest from the north wall?

A. Yes, sir.

Q. Of the roundhouse?

Mr. Miner: Farthest from the south wall, wasn't it? The north wall is this wall this way.

Witness: Here (indicating).

Mr. Miner: Down here?

Witness: That is the south wall.

Q. The engines were headed against or towards the north wall of the roundhouse?

A. No, they were headed towards the south wall; they come in from the north.

Q. Oh, yes; then we just got things reversed.

A. The roundhouse faces directly north and south.

Q. And the turntable, then, is north of the roundhouse?

A. Yes, sir.

Q. So the engines were headed against the south wall?

A. Yes, sir.

Q. And you were, you say, under the engine just south, then, of the most southerly drive-wheels of your engine?

204 A. Yes, sir.

Q. In other words, you were, then, about under the cab part of the engine?

A. Yes, sir; just where I was, right there, coming out of that, between the——

Mr. Miner: Now, that is the northerly end of the engine, Mr. Barton.

Witness: Well, it is the north end of the engine according to the way she is standing.

Q. You were just ready to get out from under your engine to the rear of the driving-wheels?

A. Yes, sir.

Q. And under the cab of the engine?

A. Yes, sir.

Q. Now, Winters' engine was headed just the same way that yours was?

A. Yes, sir.

Q. What was the last thing you had seen of Lang before you heard this report of the engine falling into place?

A. Why, just a few minutes before that he got out of there, out of the pit ahead of me, and I don't know what became of him; I was getting out of there and he was out of the pit ahead of me.

Q. Do you recollect as to whether the pilot of the Winters' engine was opposite the pilot of your engine or not?

A. About in line with it.

Q. About in line, you think?

A. The pilot of the engine Winters was working on was just a little back of—but this larger engine the pilot extends out a little farther.

205 Q. So that the pilot of your engine was closer—

A. To the wall.

Q. —to the south wall of the roundhouse than Winters' engine was?

A. Yes, sir; they all are, on all large engines, when they are placed under the center of the jack the large engines are consequently closer to the wall on account of being longer than the small engines are.

Q. Now, Mr. Hoppe, as to just when Lang got out from under your engine you don't recollect?

A. I do not; no, sir.

Q. When was this matter first called to your attention as to when Lang got out from under your engine?

A. First called to my attention?

Q. Yes, when did you first think of it since you came here to court and—was it last week?

A. I remember when the accident happened he wasn't there, he wasn't near me.

Q. How do you recollect that?

A. Because I was getting out from under the engine and there was nobody else under there.

Q. Well, I understood you to say you hadn't gotten out, you were just ready to get out?

A. Just ready to get out; yes, sir.

Q. Were you standing up?

A. I got to stand up to get out after you get back—you don't hardly stand up, either, you just crawl out.

Q. But you say you don't recollect at all when Lang got out?

206 A. Well, he was there working with me and he got out of there.

Q. You were both working together?

A. Yes, sir.

Q. What was the last thing you did?

A. Well, I was working underneath the back wheel, I was packing a cellar or something like that under there.

Q. Do you recollect what you were doing?

A. I couldn't tell just exactly what I was doing.

Q. Well, then how do you know whether Lang was helping you or not?

A. Well, because he was working with me at the time.

Q. He was your helper?

A. Yes, sir; every day.

Q. But there is lots of things that you do that he can't help you in?

A. Yes, sir.

Q. And then he is doing nothing?

A. Yes, sir.

Q. Now, then, you don't recollect what the last thing was that you did do?

A. No.

Q. You don't know, therefore, whether he was helping you do it or not, if you don't know what you were doing you surely don't know whether he was helping you or not?

A. Well, he was supposed to be helping me; I know that.

Q. Yes, but you say there are lots of things you do that he can't help you?

207 A. Yes, sir.

Q. So you don't know what he was doing, then, when you were finishing your work?

A. I do not.

Q. Nor you don't know where he was at that time?

A. No.

Q. He may have been under the engine or some place else?

A. Yes, sir.

Q. You weren't taking any notice of Lang other than simply so far as you needed his help?

A. That is all.

Q. Ain't that right?

A. Yes, sir.

Q. So you don't know whether he was under the engine when you were ready to get out or not?

A. He wasn't under there, I know that.

Q. Well, did you look for him?

A. The machinist is always the last man out; the helper usually gets out ahead.

Q. Well, we don't want to know what the custom was, we want to know what the fact was. Now, do you have any recollection about whether or not Lang was down there or not when you were ready to get out?

A. Well, I don't.

H. A. BERGERT, sworn on behalf of defendant, testified:

By Mr. Miner:

Q. Mr. Bergert, where do you live?

A. Minneapolis, Minn.

208 Q. What is your business?

A. I am a mechanical engineer for the M. & St. L. Railroad.

Q. Now, that means just what? What are your duties. What do you do? Tell the jury.

A. My duties consist of working up specifications for new engines, new cars, new passenger equipment, and also on the design or the re-design of old engines.

Q. And does that work necessarily give you a knowledge and

familiarity with the different engines operated by the M. & St. L. Railroad Company?

A. Yes, sir.

Q. Have you anything with you which shows the dimensions and make and weight of engine 159?

A. I have a model with me that shows you the shape and dimensions in proportion to the actual size, and I also have some data showing the weight.

Q. What I refer to now is the data showing the weight of the engine. Produce that, please?

A. I have with me a small tracing which we call the engine diagram. We have a diagram of every class of engine: we make this same sized tracing and put it in book form, and it contains the principal dimensions and also the principal weights. These weights are what we call the official weight of that type of engine, as shown in the various tracings.

Q. Now, what was the length of that engine from the pilot beam to the back, to the rear end of the engine frame back of the cab?

209 A. That weight was approximately—

Q. No; the length, the length?

A. The length from the front face of the pilot beam to the rear of the cab is approximately twenty-nine feet.

Q. What was the weight of the engine?

A. The total weight of the engine, that is, the official weight, is 92,000 pounds.

Q. And what is the weight of the front part of the engine exclusive of the truck?

A. I couldn't give that, exclusive of the truck.

Q. Well, with the truck?

A. With the truck is 36,000 pounds. That is the weight on the engine truck.

Q. That is the weight on the front engine truck?

A. Yes, sir.

Q. And reduced to tons that would be how many tons?

A. That would be eighteen tons.

Q. Eighteen tons would be the weight of the front end of that engine?

A. Yes, sir.

Q. Including the truck?

A. Including the truck.

Q. Can you tell approximately the weight of the truck?

A. The approximate weight of the truck would be—a conservative figure would be 6,000 pounds.

Q. Or three tons?

A. Three tons.

210 Q. So that the approximate weight of the front of the engine without the truck would be fifteen tons?

A. Yes, sir.

Q. Now, have you a diagram or drawing showing the springs and the spring arrangement under the front truck?

A. Yes, sir.

Q. Showing you defendant's Exhibit 4 I will ask you to state what that is.

A. That is the tracing that represents the engine truck spring that is applied to a four-wheeled truck on all engines running into division known as the Eastern or the Iowa Central Division, consequently that would be the spring that would have to be applied to engine 159. That is the only type of spring that we have that can be applied to that engine on account of its peculiar design.

Q. And is that the character of spring that was under engine No. 159?

A. That is the character of the spring that was under 159.

Q. Now, I wish you would explain to the jury the theory as to the construction of that spring and how it is constructed with reference to the carrying of the weight that it is designed to carry.

A. This spring was designed to carry a safe load of 20,000 pounds. And by a safe load we mean that is the actual load that is imposed upon it when this engine is in working order.

Q. And can you tell them approximately the weight that it did carry and what margin, if any, there would be there for safety?

A. The front end of the engine weighed, with the truck,
211 36,000 pounds, but that isn't the total weight that is applied to the springs. From that weight you have to deduct the weight of the four engine truck wheels, the two engine truck axles, the boxes, four of them, the four cellars connected with the boxes, the four equalizer bars, two springs and four spring hangers and also four spring hanger pins, which weight amounts to about 4,000 pounds. So that the total weight that is applied on the two springs would be 32,000 pounds, or 16,000 pounds on each spring. This would leave a margin for each spring of 4,000 pounds.

Q. Assuming that one corner of this male casting were setting on the edge of the casting below, and by the swerving of the engine or the weight of the engine—this round edge being near the edge of the other—if the two went together, what would be the effect upon that spring, if you know, that is, as to the downward motion, the extent of it? Just describe to the jury what would take place?

A. Well, the side where the two casting were in contact, that spring would have the greater weight, if the two castings were exactly in line, the weight would be distributed equally between the two springs. But on account of the contact of the casting being over about seven inches—say six,—to one side, that side would carry the greater weight.

Q. And if they slipped into place, that weight considering that size of spring and all that, what would be the effect as to the downward motion? What would be the play?

212 A. Well, in the first place, when the two castings are in contact you would have deflection in both springs, but one spring taking the greater weight would have the greater deflection. But when the two castings would slip in, the weight would be distributed equally and the deflection should be equal. But when

the casting starts to slip, the weight on the spring is released, and, in consequence, it raises up the center casting, known as the female casting. This casting would about meet the weight of the front end of the engine coming down midway between the distance that represents the depth of your female casting, or two inches, it would come up that way and meet about halfway between, or the spring would come up one inch and the other part would slip downward one inch. When the two came in contact, when they were in line, the spring would again deflect, it would deflect one inch, an additional deflection due to the momentum of the weight on the top casting. That deflection, I would estimate, would be probably half an inch, so that the spring, as the weight went down on it would deflect one-half inch and then return to its normal position, or its loaded deflection.

Q. So, if I understand you, when this casting went into its place and reached its proper position resting upon the casting below, the total deflection of the front below the normal would be not to exceed half an inch?

A. Not to exceed one-half inch.

Q. Now, I show you here a couple of small blocks of wood that are fashioned in accordance with these castings, and ask you what those are, if they are made to represent these two castings.

A. This here one is made to represent the female casting.

Q. No, you are wrong about that.

A. No, that is the male casting. That is the one that is under the engine proper. This is the female casting that rests on the truck. The two are engaged by the male entering the female; it rotates around the center.

Q. You spoke about having a model. Will you produce that model? (Witness produces model of engine).

Q. Now, will you go ahead, Mr. Bergert, and explain to the jury what that is and what it shows? I will mark this Exhibit 7.

A. This bottom portion is made to represent the floor in the roundhouse. You will notice the depression in this box affair to represent the pit, or the working-pit in the roundhouse stall. This edge here being made to represent the tracks. This here represents the rear drivers, the two driving-wheels, one on each side. This here part, the box, and this part, the axle. I want you to notice there is a slot in here on both sides of the boxes. That slot is where the frame fits the boxes. The second pair of drivers is made the same way. This here part here is made to represent the truck. There is your four wheels here. A little block here to represent the box, a little round piece to represent your axles of your engine truck wheels. This part represents the female casting; this part here represents the male casting. This here piece across here is what they call the pilot beam. This part here, from this point out to the pilot beam, is what we call the front frame. You will notice that that is a single bar, then from here on the front frame is connected to the rear frame. This is on the rear frame. This is what is called the

double-bar frame. Notice the slots for the main wheel and the rear driving-wheel. This here bar is to represent what they call the pail bar. The part across here it is known as the foot-plate, or the deck-plate. You will notice this part is loose. We allow that to be made that way so the boiler may expand. If the frame was rigidly fastened to the boiler here, when the boiler would expand we would have to make some kind of allowance to expand the frame, which if we didn't do, would tear the frame apart, because that force is sufficient to distort that frame so that it would be impossible to operate the engine. The expansion is sometimes as much as from one-half to three-quarters of an inch. So we allow a place here. Sometimes it is on the side, what we call expansion tanks. It simply acts as a guide for the boiler. This part here represents the cylinder, one on each side. This part up here is what we call the cylinder saddle. It is on the cylinder saddle where the male casting of the engine truck is fastened.

Q. Is that made to a scale, Mr. Bergert?

A. This is made approximately to a scale of one inch to a foot, or one inch equals twelve inches; one inch equals one foot.
 215 Now set it up as this engine was set up with the four screws under the rear, the front boiler deflected slightly.

A. (Witness sets up model.) The four jacks in the rear, now, and the two jacks up here in front. The front jack up way above the two front trucks now.

Mr. Miner: I offer this model in evidence.

Mr. Barton: No objection.

The Court: Received without objection.

Cross-examination.

By Mr. Barton:

Q. I didn't get the weights. What, do you figure the weight of this engine with the front trucks off?

A. No, the weight on the front end is 36,000 pounds; that includes the entire truck.

Q. Well, what do you mean by the front end, now?

A. The front end is the weight that is resting on the truck, including the truck. In other words, when we weigh that we put the scale under the wheels, under the four engine truck wheels.

Q. And the driving-wheels are standing on something else, then, than the scales?

A. No, sir.

Q. How is that?

A. When they weigh that engine they have scales on each individual driving-wheel and on both engine truck wheels.

Q. Well, 36,000 pounds, you say, the front end?

A. No, sir. That is official weight.

Q. When you say official weight what do you mean by
 216 that?

A. It means it is weight that is verified by the locomotive builders as the weights that they furnish us.

Q. Of a new engine?

A. Of a new engine, and that weight is supposed to be witnessed by one of our own representatives.

Q. Do you know how that weight is arrived at?

A. Yes, sir. I seen one weighed just recently.

Q. How did they ascertain it?

A. They have what they call individual scales, and these scale they raise upon an I-beam so that they can move it any distance they desire, so that when they place it directly under the wheels they raise it up, and then there is a beam on each individual scale, and the man takes the weights of them.

Q. So that there would be a scale for the front two driving-wheels and a scale for the rear two driving wheels?

A. Yes, sir.

Q. And the scale for the trucks under the front end?

A. Yes, sir.

Q. That would require three scales?

A. They would have four scales on an engine like that.

Q. Where would the fourth one be?

A. Well, it would be individual scales for the two truck wheels.

Q. Oh, individual scales for the two pair of truck wheels?

A. Yes, and they would add the two weights.

217 Q. Now, then this 36,000 pounds, would that be secured from the two scales under the truck wheels?

A. Yes, sir.

Q. That wouldn't include the weight, then, under the driving-wheels at all?

A. No, sir.

Q. Or any portion of it?

A. No, sir.

Q. Do you know what the scales would show then at the same time for the driving-wheels?

A. It would show the weight on the driving-wheels.

Q. And how much?

A. Well, in this case it would show 18,000 pounds on each truck wheel and it would show—I couldn't tell you. Approximately the total weight would be equal on the drivers. I think the total weight is 56 on a driver, that would be distributed on this kind of engine, because the weight is equalized and distributed equally between the two driving-wheels, and those weights are all taken at the same time.

Q. Suppose that you took out the middle driving-wheels—and by the middle I mean the driving-wheels nearest to the trucks under the front end—and weighed it with the scales under the rear driving-wheels only and under the truck under the front, what would be the measure of the rear driving-wheels then?

A. That weight would be 56,000 pounds; it would be the total weight that is on the two drivers.

218 Q. In other words, if you weigh the front end on one scale and the rear end on another scale at the same time, the rear scale would show 56,000 pounds and the front scale 36,000 pounds?

A. Yes, sir.

Redirect examination.

By Mr. Miner:

Q. Does that statement show the number of flues in that boiler of that No. 159?

A. Yes, that statement, and I have another statement shows the number of flues.

Q. What is the number of flues?

A. 142.

Q. Let me ask you, with this engine in this shape; with the four jacks under the rear, and the two castings, the upper one resting with just its edge on the upper edge of the lower one, and with one jack under the corner of the pilot beam, and the jack on the opposite side down, if the front of the engine should move sufficiently so that those two castings come into alignment, would there be deflection enough there so that they would come together?

A. I think it would.

Q. The rigid jack, of course, standing up under the pilot beam the same height as the top of the surface of the lower casting?

A. Yes, sir.

Q. Do you remember the exact depth of that entrance into the lower casting?

A. Two inches.

Q. So that would be the necessary deflection for it to drop, it would drop two inches if they came together?

A. If they came together.

Defendant rests.

CHARLES WINTERS, re-called on behalf of plaintiff, in rebuttal, testified:

By Mr. Barton:

Q. What do you know, Mr. Winters, about whether there was any work done on this jack here in court in the shops at Marshalltown recently?

A. Why, I seen them overhauling it down there before it came up here.

Q. Do you know what they were doing to it?

A. Well, they put new leathers in it.

Mr. Miner: He asked you if you knew what they were doing to it.

Witness: I was telling you, they put new leathers in it.

Mr. Miner: Well, wait a minute. That can be answered yes or no, if the court please.

Witness: Oh, I see.

Mr. Miner: I would like to have it so answered.

Witness: Yes, sir.

Q. Now, what did you see them doing to it?

A. I saw them putting new leathers in it. I seen Dode Conn take that lever in the blacksmith shop and get it fixed.

Q. Which lever do you mean, the open-end wrench or the regular lever?

A. The regular lever.

220 Q. What else, if anything, did you see them doing with it?

(No answer.)

Q. If you don't recall anything else, all right. Now, you say you saw them putting in new leathers; what do you mean by that?

A. That is leathers on the end of the piston.

Q. What are those leathers used for? What is their purpose, in other words?

A. To hold the pressure.

Q. What pressure?

A. Well, that they put on the jack under the piston.

Q. They serve what purpose, those leathers?

A. Well, as a pack.

Q. What is the cause or reason for that jack leaking here, if you know?

A. It is leaking by the leather or it wouldn't run out.

Q. How is that?

A. It is leaking by the bushing there, or the leather, or it wouldn't run out there.

Q. Now, where does this leaking come from that we see here?

A. It comes from out under the jack.

Q. Is it escaping from around the piston part of the jack?

A. Yes.

Q. What effect, if any, has that leaking that we see here with this jack upon the question of the open-end wrench remaining in it dropping down?

A. Well, if it leaked enough it would leak the pressure off
221 and it would go down.

Q. What is the effect of that chain arrangement here on this jack with reference to its tripping?

A. Not any that I know of.

Q. Will you please explain just how this tripping process comes about, of a jack, what causes it?

A. Well, take a wrench like that; when it goes down to where that lug should stop it, after it passes that depth of the lug there, or the length of it, the chamber there become larger and frees the piston, then it drops down on—goes on down on to the valve and opens it.

Q. There is a hole through the center of that piston, I believe you told us this forenoon?

A. Yes, sir.

Q. Is there something that goes through, then, that hole?

A. Yes, sir; the plunger goes up and down that hole.

Q. There is a rod that is connected with this lever here in the head of the jack?

A. Yes, sir.

Q. And that rod goes through to the other end of the piston and there connects with what?

A. Well, it connects with the packing on that end, is all, and the

valve there. This rod in the plunger and that rod is all the same piece of iron.

Q. It has the plunger then at the other end of this piston?

A. Yes, sir.

Q. That plunger works in the hollow part of this piston?

222 A. Yes, sir.

Q. And there is a rod going through that hollow part that connects with that plunger part?

A. Yes, sir.

Q. And the top part of it is connected with the lever arrangement here?

A. Yes, sir.

Q. Now, at the lower end of the piston is the hole the same size as it is all the way through it?

A. No, sir.

Q. Is it larger or smaller?

A. It is larger.

Q. This plunger head, then, it has to go down how far before it will trip the jack?

A. It has to go below that lug, the length of that lug on the—

Q. But now with reference to the hole in the piston how far must that plunger go down, to the place where it gets larger?

A. Well, just as it gets to where the lug is, why,——

Q. Well, I am not talking about the lug now, I am talking about the plunger head in the piston; how far must you get that plunger head down before it will trip?

A. You got to get it down to just where the lug stops the piston.

Q. Well, where will the piston head be then?

A. It will be clear down.

Q. Or the plunger head be?

A. It will be down within about three-quarters of an inch
223 of clear down.

Q. Well, where will it be with reference to the larger part of the opening through the piston?

A. It would be in that then.

Q. It gets into the larger part?

A. Yes, sir.

Q. That plunger has to go down until it gets to the larger part of the hole in the piston?

A. Yes, sir.

Q. And what effect has that, then, upon the jack?

A. Well, that releases any pressure underneath the plunger. Then if you open the valve, then it allows the oil to come right up around it and come back up into the head.

Q. Who was it that you saw working with this jack down at Marshalltown?

A. It was Dan Arnold and Dode Conn.

Q. Who is Mr. Arnold?

A. He is a machinist working down there.

Q. And Mr. Conn——

A. He is another machinist.

Q. —is the man that was the foreman over your son when he got hurt?

A. Yes, sir.

Q. Is he here in court?

A. I see him here a while ago.

Q. Now, this leather that you say you saw them putting new leather in it, what was that leather being put on, or what part of the jack is it in?

A. On the end of the piston.

224 Q. Then they had to take the jack apart to do that, did they?

A. Yes, sir.

Q. They had it apart?

A. Yes, sir; had it all apart there.

Q. Were you with them all the time they were working at it, or did you just simply be there a short time and then go away?

A. Oh, I just happened in the shop and asked them what they were doing with the jack, and they said they were fixing it up for the trial, and I walked on. I see them put the leather in.

Q. So you were not there either when they commenced or when they finished the work?

A. No.

Q. What would prevent the jack from going down, Mr. Winters, with the lever left in it?

A. Why, the valve in the bottom of that piston if it leaked it would hold that wrench right up, hold the lever up like that, that would let a pressure underneath the plunger, and it would hold right there if that valve leaked.

Q. Mr. Winters, did you put marks upon the jack that was brought here for the last trial of this case before this?

A. Yes, sir.

Q. What marks did you put on it?

A. I put three crosses on it.

Q. Where did you put them? Just step down here and show the court and jury.

A. I put one right in the center of this lug here, this here.

225 Q. Pocket?

A. Socket.

Q. That the valve goes in?

A. And then I put one on the flat spot there where it works, and I put one down here on the bottom of it.

Q. How did you put those marks on?

A. I put them on with a chisel and hammer.

Q. Then you cut it in the metal?

A. Yes, sir.

Q. Have you examined this jack to see whether there was any such marks on it?

A. Yes, sir; I just looked it over.

Q. Are there any such marks on it?

A. No, sir; there isn't.

Cross-examination.

By Mr. Miner:

Q. So you were marking up our property, were you?

A. Yes, I marked that jack.

Q. You have seen that jack stand there with that open-ended wrench in it now for an hour and forty minutes, haven't you?

A. Yes, sir.

Q. And you haven't seen it go down?

A. No, sir.

Q. You said it would go down?

A. Yes, sir.

Q. But you were mistaken about that?

A. No, sir.

Q. Oh, you weren't? You claim that it will go down easier with the weight of a locomotive resting on it than it would now
226 with that slight pressure?

A. The jack isn't working proper.

Q. What is wrong with it?

A. It has a leak in there.

Q. What has that to do with it?

A. It holds it up.

Q. What do you mean by that?

A. If that valve in the bottom of the piston leaks it holds that lever up.

Q. Do you mean to say that the valve in the bottom of that is leaking?

A. Yes, sir; I would say it was.

Q. You describe to this jury the condition that valve is in right now?

A. Well, I can't tell whether there is a hole in it.

Q. In order for it to do what you say it is doing what must be its condition?

A. Well, there must be a little piece of dirt under it or a little raveling of some kind; a little piece of waste or any thread under it would hold it up there to cause it to leak,—a little grain of sand.

Q. And you say if it leaked it wouldn't go down?

A. No, sir; that wouldn't go down.

Q. And you testified before that if it did leak it would go down, didn't you?

A. No, sir.

Q. It is the opening of the valve and the escape of the oil below that lets it go down, isn't it?

A. Yes, sir.

227 Q. Yes, of course, it is. And you say that is what it is doing now, but it don't go down, does it?

A. It wouldn't go down, the jack proper wouldn't go down unless the valve leaked in the other piston, in that plunger.

Q. Well, do you tell this jury that there is a hole in that valve there now?

A. Yes, sir.

Q. All right, we will take it apart and see whether there is or not.

A. Either that, or it may be a piece of dirt under it, I couldn't say.

Q. Yes. Well, we will see whether that is so or not. If the court please, I would like to have time to take this apart and see whether there is any hole in that valve there or not. This man says there is; now, I would like to know whether there is or not.

The Court: How long will it take you, counsellor?

Mr. Miner: I don't know.

The Court: Who is going to clean up my floor there?

Mr. Miner: Can you take it apart, Mr. Bergert?

Mr. Bergert: I don't know how to take it apart.

Mr. Miner: I am not a machinist, I don't know how to take it apart.

Witness: You would have to take it to a machine shop.

Q. Why?

A. You couldn't screw that head off by hand.

Q. You say it can't be taken off here; why not?

228 A. Oh, it can if you get tools to do it with.

Q. What tools do you need to take it with?

A. A pike wrench and Stillson.

Q. Does this top here have to be screwed off?

A. Yes, sir. They are made up pretty tight sometimes.

Q. Now, where do you say that this oil is leaking from?

A. Outside?

Q. Yes.

A. That leaks by the leather.

Q. Leaks by what leather?

A. On the end of the piston.

Q. Well, it is emptying that jack, then, isn't it?

A. Well, it ain't now, it has got the pressure on. It has got the leather set out and it ain't leaking.

Q. Hasn't this been leaking ever since it has been standing there?

A. I don't know.

Q. It is leaking right now, isn't it?

A. No, sir; I don't think it is.

Q. Every drop of oil that comes out of there lessens the power of that?

A. If it was leaking around there now the jack would go down.

Q. Do you mean to tell this jury that it ain't leaking around there now?

A. Yes, sir.

Q. I suppose that oil that is on the floor hasn't leaked out?

229 A. If it is leaking why don't it go down, what is holding it on?

Q. It is for you to say. You know so much about it.

A. The pressure is holding it up.

Mr. Barton: Didn't you see the oil there this forenoon?

Mr. Miner: I saw some oil there, but not the oil that is there now.

Witness: That oil leaked out when there was no pressure on it.

Q. Well, the jury has been sitting right there.

A. Probably they know now whether it is leaking or not; the jack don't go down.

Q. No, of course not. If the oil all leaked out the jack would go down?

A. Sure.

Q. Of course. That is one thing you have said that is certain, no question about it. Now, how did you happen to be out in the shop this time you stated?

A. Why, I have business out there right along.

Q. What business did you have out there?

A. I don't remember just what it was at that time.

Q. You don't remember what business you had?

A. No.

Q. There are twelve of these hydraulic jacks down there that you have told about?

A. Yes, sir.

Q. How do you know this was the one that was being fixed?

A. This one?

230 Q. Yes, sir.

A. I see it down there.

Q. How do you know this was the jack?

A. They told me it was.

Q. How can you distinguish this from any other jack down there?

A. Well, just by the looks of it, is all.

Q. Why, didn't you put a mark on this jack like you say you did on the other?

A. I didn't have time to have a mark.

Q. You didn't have a chance or opportunity; it wasn't from lack of disposition, but because you didn't have an opportunity. Is there anything about this jack that distinguishes it from any other jack there of the same size and character?

A. Well, it is oily all over, and the way they had it there and got oil all over it. Them other jacks have got no oil on them.

Q. You are prepared to tell this jury that the other eleven jacks down there haven't got any oil on them?

A. Not like this one, and none of them will work that I have seen.

Q. None of them will work?

A. No.

Q. The eleven jacks are all out of commission, they won't work?

A. There ain't eleven of them.

Q. Well, you said there were twelve all together, and there is one here, that leaves eleven.

A. No, sir; not like that; there is only six like that.

231 Q. Then you mean there are five of them that are not workable?

A. Yes, sir.

Q. What is the matter with them?

A. They are leaking and worn out.

Q. Then this is the only jack that the railroad has at the present time down there that will work, you say?

A. Yes, sir.

Q. And that is the only reason you can give as to why you know this is the jack they were working on?

A. Yes, sir; it has been fixed up.

Q. They repair those jacks whenever they need repairing, don't they?

A. No, sir; they stopped overhauling them and got new jacks now, what they call a Norton jack.

Q. Oh, well; as long as they were in use whenever they needed repairing they repaired them, didn't they?

A. When they was in use they did; yes, sir.

Q. Well, how long since they have gone out of use?

A. Well, they don't overhaul them since the boy got hurt. I know I took one over to the toolroom, and the man that overhauled them told me he wouldn't overhaul it because he had orders to scrap them as fast as they come in, they wasn't going to use them any more.

Q. Who told you that?

A. A fellow by the name of Charlie Nichols.

Q. How is that?

232 A. A machinist there or tool man.

Q. What is his name?

A. Nichols.

Q. And you want to tell this jury that there have been none of those jacks used there since your son got hurt?

A. Oh, they have tried to use them, and used them, but they haven't repaired any of them that I know of.

Q. Well, that is a very significant qualification, "that you know of." But do you mean to tell this jury that those jacks haven't been used, any of them, since your son got hurt?

A. Oh, they have been used, yes. I have used them.

Q. Well, when did you use them last?

A. I said they told me after that they wouldn't repair any more of them because they was going to scrap them as fast as they got bad order so as they wouldn't work.

Q. How lately has any of them been used down there?

A. I don't know.

Q. Well, you are around there all the time, aren't you?

A. No, not all the time.

Q. Well, most of the time?

A. Yes, most of the time.

Q. And you are pretty observing?

A. Yes.

Q. Well, now, can you tell this jury the last time you know of one of this kind of jacks being used down there around
233 those shops?

A. No.

Q. You couldn't tell that?

A. Well, they don't use them for any great jacking; any little thing they try to put them under to hold a little heft, but they never pretend to jack up an engine any more with them that I have seen.

Q. No. That one wouldn't jack up an engine now, I suppose?

A. I don't know.

Q. What?

A. It might, yes. I think it would.

Q. You think it would?

A. Yes, sir.

Q. Well, do you know of any reason why any of the others wouldn't?

A. The other jacks?

Q. Yes.

A. Yes.

Q. What?

A. Because they leak.

Q. Well, this is leaking, isn't it?

A. Not to affect it from jacking up.

Q. What?

A. Not to affect it from jacking an engine up, I guess.

Q. It depends on the amount of the leak?

A. Yes, sir.

Q. And those down there leak excessively?

A. Yes, sir.

Q. You have seen that, have you?

A. Yes, sir.

234 Q. How frequently have you seen that?

A. Well, here sometime ago I tried three of them to try to jack an engine up a little, and we couldn't get them to work.

Q. They wouldn't work?

A. No.

Q. When was that?

A. Oh, perhaps a couple of months or so ago.

Q. And there hasn't been any of them used there since then?

A. I don't know that.

Plaintiff rests.

L. S. HELGERSON, recalled on behalf of defendant, in rebuttal, testified:

By Mr. Miner:

Q. How frequently are you around and about the shops there at Marshalltown, Mr. Helgerson, in the course of your work?

A. Oh, once or twice a week.

Q. Just tell the gentlemen of the jury there what the fact is as to what you observed, if anything, with reference to the use of these hydraulic jacks around there in the last year.

Mr. Barton: That is objected to as incompetent, irrelevant, immaterial and no foundation for it. Here is a man who is not a machinist, been around the shops once a week perhaps; what would he know about the use of jacks there.

Objection sustained.

235 The defendant then rested, and this closed the testimony. The case was summed up by Mr. Miner on behalf of the defendant, and court was adjourned until the morning of March 24, 1915.

Mr. Bryan: We neglected to make a motion for a directed verdict and with Mr. Barton's permission I will make it now.

Mr. Barton: I have no objection.

Mr. Bryan: At the close of all the evidence the defendant moves the court to direct a verdict in favor of the defendant and against the plaintiff on the grounds stated in defendant's motion for a dismissal of this case at the close of the plaintiff's testimony.

Mr. Barton: I object to the granting of the motion.

The Court: And I deny it under the statute.

Mr. Barton then summed up the case on behalf of the plaintiff, whereupon the court charged the jury as follows:

Charge.

GENTLEMEN OF THE JURY: The plaintiff, George H. Winters, prosecutes this action against the defendant, Minneapolis & St. Louis Railroad Company, to recover damages to compensate him for injuries to his person, received on October 21, 1912, while he was working as a servant for the defendant company in its roundhouse or shops at Marshalltown, Iowa, and which injuries the plaintiff 236 claims happened to him because of the negligence of the defendant company. While in his pleading he sets up a number of alleged acts of negligence, as I recall the evidence, they are, by the testimony at this trial, reduced to practically one,—that the defendant company failed to furnish to the servant, with whom the plaintiff was working, a reasonably safe instrumentality, called a hydraulic jack, which was operated by an instrument called a wrench instead of one spoken of as a lever.

It appears uncontradicted that the plaintiff with another employee of the defendant named Larson, were engaged, at the time of the injury, in raising the front end of a locomotive, and to do so, these hydraulic jacks were used, the plaintiff using one on the right-hand side and Larson the one on the left. The plaintiff's claim is that the jack in charge of the plaintiff was operated by a lever, having what is called a lug on it, and the one operated by Larson by what is called a wrench, and that this wrench was not a reasonably safe instrumentality. The defendant, on the other hand, insists that this wrench was a reasonably safe appliance and that it does not appear from the evidence that the use of the wrench had anything to do with the happening of the accident. You have heard all the evidence for and against these claims and have observed the wrench itself in action before you, and you are the sole judges.

The defendant claims that it was impossible for this jack on Larson's side to fall of its own weight and thus cause the locomotive to fall and injure the plaintiff. The jury are sole judges 237 of the fact in the case. You are sole judges of the testimony that has been given before you by every witness and of what

credit you will attach to the testimony of each witness and of what reasonable deductions and conclusions you will draw from all the proven facts and circumstances of the case. The fact that the locomotive did fall and injure the plaintiff is not sufficient, standing alone, to permit or authorize the jury to award him damages for his injuries against the defendant company. Before the plaintiff can charge the defendant for his injuries he must satisfy you by a fair preponderance of the evidence (which means a fair overweight of the evidence) that he suffered this injury because of the negligence of the defendant company in failing to furnish its employe Larson with a hydraulic jack, reasonably safe instrumentality for the purpose used and with a reasonably safe appliance to operate this jack with.

I have said that the defendant company was not an insurer of the safety of the plaintiff. It was not an insurer, but as the master, the defendant company owed the plaintiff the duty to use reasonable care to furnish its servant Larson, with whom the plaintiff worked on this locomotive, instrumentalities reasonably safe with which to do the work required of them at that time.

Now, negligence is best defined by telling you what is meant by the term "reasonable care." Reasonable or ordinary care is that
238 prudence, foresight and care which persons engaged in like work or business would use under the same facts and circumstances or under similar facts and circumstances, and failure to use such care is negligence. If, after considering carefully all the evidence, you are not satisfied that the defendant company was negligent in the furnishing of this jack in question to Larson and the appliance to work it, then, as I view the evidence, there is nothing upon which you could base a finding for the plaintiff and your verdict should be for the defendant. If, on the other hand, you are satisfied from the evidence, after careful consideration, that the instrumentalities furnished Mr. Larson on that occasion were not reasonably safe and that as a result of that the locomotive was caused to fall upon the plaintiff's hand and injure him, then the plaintiff is entitled to recover in this action unless you also find that the plaintiff, in the manner in which he acted just about the time of the accident, assumed the risk of the situation.

It is claimed by the defendant that the plaintiff, after he had removed a block, I think, from the top of the jack (rested his hand upon the top of the jack in such position, as they claim, that it was not necessary at all for him to do and that he knew if he kept his hands there and the locomotive should fall, he would be injured, that he thereby assumed the risk. I charge you that a man who knows all the facts and circumstances attending the situation and appreciates the risks that he runs when he places himself in a position to be injured, then he thereby assumes the risk of such
239 situation and he cannot recover.

Now, if you find that this young man assumed the risk, then he cannot recover in this case. But, on the other hand, if you find that he did not assume the risk, then you will disregard that feature of the case.

It has also been claimed by the plaintiff that even if it should be found that the plaintiff, Mr. Winters, did not assume the risk of this situation, that at any rate he was guilty of contributory negligence in the manner in which he placed himself at the time and just immediately before the accident happened.

Now, the law charged Mr. Winters with the same duty to care for himself as the law charged the defendant the duty of furnishing reasonable appliances. He was bound to use reasonable care, that care which a person of ordinary and reasonable prudence and foresight would use under the same circumstances and a man of this age would use under the same circumstances to care for himself. If you should find that the plaintiff did not use that care, then you could determine that he was guilty of contributory negligence. Contributory negligence, however, under the laws of the United States, under which this action is being tried, would not debar the plaintiff from recovery, if you find otherwise that he is entitled to recover. I will explain to you, as I go along, what the effect of contributory negligence would be under such circumstances.

Now, gentlemen of the jury, if, after a careful, painstaking, 240 unbiased and unprejudiced consideration of all the evidence in this case you determine that the plaintiff is entitled to recover a verdict, then you will next consider the question of his damage. That question is left in the law to the unprejudiced, calm, judicial discretion of you twelve men as men of affairs applying that discretion to the proven facts and circumstances of the case. You have a right to take into consideration the character of the injuries suffered by the plaintiff, the pain of mind and body suffered by him, the length of time that he was confined during the recovery, as far as there can be any recovery in this case, of the wounded hand, and you have a right to take into consideration the character of the injury on the hand and the fact that necessarily it is a permanent injury. Taking all these matters into consideration it will be your duty to award him such damage for his injuries as in the exercise of that calm judgment I have spoken of would compensate him for the injury.

Now, in case you should determine that Mr. Winters, the plaintiff, was guilty of contributory negligence, then you will apply that fact in this way: I have said it does not debar him from recovery, but you will reduce the amount of his recovery in the proportion in which you find his negligence contributed towards the entire negligence in the case; that is, the combined negligence of the plaintiff and the defendant in what proportion the plaintiff's negligence contributed and deduct that amount on account of his contributory negligence.

241 Take the case, gentlemen.

The form of your verdict will be, if you find for the plaintiff, We the jury, find for the plaintiff and assess his damages at the sum you determine he should recover. If you find for the defendant, of course the form of your verdict would simply be, We, the jury, find for the defendant.

Under the practice law of this state, the jury, when their verdict

is unanimous, will bring in a verdict signed by your foreman. If, however, after being twelve hours in consultation after you go out with this case, you are unable to make an unanimous verdict, then any ten or eleven of your number may determine what the verdict should be, and those ten or eleven will each sign his individual name to that verdict.

The jury retired to the jury-room to deliberate upon a verdict. A stay of forty days was entered.

Verdict.

The jury returned a verdict in favor of the plaintiff in the sum of \$8,000.

GEORGE H. WINTERS, Plaintiff,
vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Notice of Proposed Settled Case.

To Barton & Kay, Attorneys for Plaintiff:

You will please take notice, that the foregoing transcript consisting of 162 pages of typewritten matter is proposed by the defendant as the case to be settled and allowed by the Honorable William Louis Kelly, the judge who tried this cause, and that the said proposed case will be presented by the defendant to the said judge in his chambers in the court house in the city of St. Paul, Ramsey county, on the 8th day of May, 1915, at 10 o'clock A. M., or as soon thereafter as counsel can be heard for settlement and allowance.

W. H. BREMNER,
F. M. MINER,
Attorneys for Defendant.

Due and personal service of the foregoing proposed settled case, and of the foregoing notice in relation thereto is hereby admitted at St. Paul, Minnesota, this 30th day of April, 1915.

BARTON & KAY,
Attorneys for Plaintiff.

GEORGE H. WINTERS, Plaintiff,
vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Certificate Settling Case.

I hereby certify that the foregoing case, consisting of 162 pages of typewritten matter, has been examined by me and found conformable to the truth and to contain all the evidence offered or in-

roduced on the trial of this cause, the charge in full and all objections, rulings, orders and all other proceedings of said trial, and I hereby settle and allow the same as the settled case herein.

All exhibits offered or received in said cause, and the verdict as rendered, may be considered as a part of the settled case the same as if included herein.

243 Dated this 22nd day of May, 1915.

WILLIAM LOUIS KELLY, Judge.

Filed June 24, 1915. Matt Jensen, Clerk, by A. P. Ritz.

GEORGE H. WINTERS, Plaintiff,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Stipulation Settling Case.

It is hereby stipulated by and between the parties hereto that the foregoing proposed case, consisting of 162 pages of typewritten matter, containing all the evidence offered or introduced, all rulings, orders and objections and other proceedings on the trial of said case, and that the same is correct and, together with the verdict as rendered,, is hereby constituted a settled case herein, and the same may be settled and allowed as the settled case herein by the Honorable William Louis Kelly without notice.

It is further stipulated and agreed that all of the exhibits referred to in the settled case, together with the verdict as rendered, are part thereof and shall be by the clerk of the District Court transmitted to the clerk of the Supreme Court on appeal.

Dated this 30th day of May, 1915.

BARTON & KAY,
Attorneys for Plaintiff.
F. M. MINER,
W. H. BREMNER,
Attorneys for Defendant.

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GEORGE H. WINTERS, Plaintiff,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Notice of Motion for Judgment Notwithstanding the Verdict or for New Trial.

Take notice that on the case settled herein, the defendant will move the court at its chambers in the court house, in the city of St. Paul, Ramsey county, on the 8th day of May, 1915, at ten o'clock A. M., or as soon thereafter as counsel can be heard for an order for judgment in its behalf notwithstanding the verdict on the ground that the court erred in denying its motion for a directed verdict made at the close of all the testimony, and if that be denied for an

order setting aside the verdict herein and granting a new trial with costs on the following grounds:

1. That the damages are excessive appearing to have been given under the influence of passion or prejudice.

2. That the verdict is not justified by the evidence and is contrary to law.

3. That the court erred in denying defendant's objection to the following question:

"Q. Supposing that engine was standing in the roundhouse at Marshalltown, Iowa, the wheels all on, the driving-wheels, and the rear of the engine was resting upon four screw jacks placed underneath the iron that runs across the rear of the rear part of the engine, two of the screw jacks being on one side and two on the other, and the front of the engine had been raised up by two hydraulic

245 jacks of the kind this is here in court, one of those hydraulic jacks on either side of it and under the ends of the pilot beam, so that the engine was so resting upon those screw jacks at the rear and the two hydraulic jacks at the front, and that the hydraulic jack on the right side had been lowered so that it was free from the pilot beam, and that a wrench similar to Exhibit B here had been used in this jack on the left-hand side when it was last pumped up, and that wrench had been left in the jack when so last pumped up, would that open-end wrench so left in settle down of its own accord and trip that jack?"

4. That the court erred in denying defendant's motion made at the close of plaintiff's case to dismiss this action upon the grounds therein stated, to-wit:

"At this time, if the court please, I desire to move the court to dismiss this action for the reason that upon the state of the proof at the close of the plaintiff's testimony no negligence on the part of the defendant has been shown as the proximate cause of the injury which the plaintiff sustained; that the state of the proof at the close of this trial so far as the plaintiff is concerned, is no different than it was at the close of the former trial, and the Supreme Court of this state, upon the state of the proof at that trial, as I understand it, held that it did not appear from such proof that the use of the open-ended wrench was the cause of the injury to plaintiff. And if that was the condition at the close of the evidence on the other trial, I don't

246 see that that condition has been changed at all by the evidence in this trial. Also, upon the further ground that it appears incontestably here that the plaintiff assumed the risk of the exact consequence that came from his act. His testimony is that he fully appreciated that if the engine came down his hand would be crushed; that he knew that when he put his hand in to shove the block off from the top of the jack, and that he comprehended that the engine, if it came into place, would necessarily catch his hand by the coming down of the pilot beam, and that it would crush it. I say that it was a perfectly obvious danger, and the plaintiff says that he comprehended it, and he assumed, in the law, the very consequence occurring. Your Honor, I think, is

familiar with the decision in the federal court; they held that under the federal act upon which this cause is predicated, that the defense of assumption of risk is still available to the same extent and in the same way as construed by the federal courts prior to the adoption of that act. And upon the further ground that the plaintiff was guilty of contributory negligence and that that negligence that want of care upon his part, was a contributing and proximate cause of the injury which he received."

5. That the court erred in sustaining the plaintiff's objection to the proof offered by defendant as shown by the questions and objections as follows:

"Q. Were you familiar with the engine No. 159 on which the plaintiff was working at the time the injury was received?

A. I know the engine.

247 Q. I will ask you whether or not after the injury was received you conducted a series of experiments with reference to that engine and the operation of the hydraulic jack which young Larson was using in the manner in which he was using it at the time the accident occurred.

A. Yes sir.

Q. I wish you would describe to the jury just what was done.

Objected to as incompetent, irrelevant, immaterial and no sufficient foundation laid.

The Court: What do you intend to show, Mr. Miner,—that they took these machines and experimented with them or what?

Mr. Miner: That they took this engine 159 and took this hydraulic jack and put it under the end of the pilot beam, and the purpose is to show the effect of raising the corner of the pilot beam up, as they claim that it was raised up, and leaving this open-ended wrench in there, as they claim it was left there."

The Court: Well, if counsel objects to it I don't believe it is proper unless it is shown that it is absolutely the same condition.

Q. Do you know whether or not that engine No. 159 was in the same position and condition at the time this test was made that it was in at the time Mr. Winter was hurt?

A. In the same condition.

Q. Do you know whether or not the jack that was used with which the experiment was made was the same jack and in
248 the same condition as when Mr. Winter was hurt?

A. Well, it was the same jack. Of course, I am not an expert on a jack. I couldn't testify as to the conditions of the jack.

Q. It was the same hydraulic jack?

A. The same hydraulic jack.

Q. And do you know whether or not the open-ended wrench that was used in the experiment that was made is the same open-ended wrench that is now in court?

A. Yes, sir.

Q. That was used on the former trial of this action?

A. Yes, sir; it was

Q. And was the jack placed under the front end of the locomotive, under the pilot beam, in the same position as described by young Larson in his testimony on the last trial?

A. It was.

Q. And was the jack elevated in the same way as was described by young Larson in his testimony upon the trial in the last trial of this case?

A. Yes, sir.

6. That the court erred in sustaining an objection to defendant's offer to prove the following facts in reference to the test that was made with the jack and an open-end wrench upon the same engine by which plaintiff was injured, such offer of proof and the proceedings had with respect thereto being as follows:

"Mr. Miner: Now, if the court please, I offer to prove by 249 this witness that under those circumstances with the same engine and the same condition, the same jack and the same open-ended wrench, that the corner of the pilot beam was raised up by force of the hydraulic jack exactly as was done by young Larson, and that the open-ended wrench was left in the jack for the purpose of determining the question as to whether or not under those circumstances the head of the jack would be caused to go down by means of the open-ended wrench being left in there, and offer to show that the test showed that the open-ended wrench would not go down, and that it required the application of I think something like 160 pounds of weight attached to the end of the open-ended wrench before it could be forced down low enough to cause the jack to trip.

Mr. Barton: Before I make my objection I want to ask the witness a few questions, your Honor.

The Court: Yes.

By Mr. Barton:

Q. Where is your home?

A. Oskaloosa, Iowa.

Q. You were not present at the time of this accident?

A. No, sir.

Q. Where were you on that date?

A. I was in Marshalltown the morning following the accident. I couldn't say, Mr. Barton, where I was the date of the accident.

Q. Then you know nothing about the jacks that had been used under that engine excepting what was told you?

250 A. This jack was set aside, Mr. Barton?

Q. Well, did you set it aside, Mr. Helgersen?

A. No, sir; I didn't.

Q. Well, then you don't know anything about that?

A. I don't, except it was set aside as being the jack.

Q. Well, as some person told you.

A. Yes, sir.

Q. That is all you know about it?

A. Yes, sir.

Q. It was pointed out to you by some person?

A. Yes, sir.

Q. How it got there you don't know of your own knowledge anything about it?

A. No, sir.

Q. Nor you don't know anything about what has been done with the jack during the period of time elapsing from the time of the accident until the next day?

A. No, sir.

By Mr. Miner:

Q. You know it was the jack used on the other trial, do you not?

A. The jack used on the other trial.

Q. And the same jack that is now in court?

A. The same jack that is now in court.

By Mr. Barton:

Q. But you weren't present on the other trial?

A. Yes, sir.

Q. You were in court here during the whole trial?

251 A. I have been here each day.

Q. You know everything that was said and done on the other trial?

A. I don't pretend to know everything, no.

Q. Well, you were in court all the time?

A. Yes, sir.

Q. Sitting beside Mr. Miner?

A. Back of him, I believe.

Q. Yes, prompting him along the trial?

A. No, sir.

Q. You made suggestions to him?

A. Certainly.

Q. Do you recollect this taking place at the close of the trial: 'Mr. Miner: So far as I know, if the court please, the court and the jury are in possession of all the facts so far as we know them. Defendant rests.' And you weren't called as a witness, nor no one else called as a witness by the defendant; ain't that true?

A. That is true.

Mr. Barton: This evidence is objected to as incompetent, irrelevant, immaterial and no sufficient foundation laid for it.

The Court The objection to this testimony is sustained.

Exception by defendant."

7. That the court erred in denying defendant's motion made at the close of all the testimony to direct a verdict in its favor, for the reason set forth in assignment of error number 4.

8. That the court erred in ruling as a matter of law, that the plaintiff at the time of receiving his injury, was an employee engaged in interstate commerce.

252 9. That the court erred in instructing the jury in the following particular, to-wit:

"Under the practice law of this state, the jury, when their ver-

dict is unanimous, will bring in a verdict signed by your foreman. If, however, after being twelve hours in consultation after you go out with this case, you are unable to make an unanimous verdict, then any ten or eleven of your number may determine what the verdict should be, and those ten or eleven will each sign his individual name to that verdict."

W. H. BREMNER,
F. M. MINER,

Attorneys for Defendant.

Service of the above and foregoing motion for judgment notwithstanding the verdict or for a new trial is hereby admitted, and the receipt of true copies thereof is hereby acknowledged.

Dated at St. Paul, Minnesota, this 30th day of April, 1915.

BARTON & KAY,
Attorneys for Plaintiff.

GEORGE H. WINTERS, Plaintiff,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Order.

After hearing counsel for the respective parties and upon the pleadings and settled case,

Ordered (1) that the defendant's motion for an order setting aside the verdict heretofore rendered herein and for judgment in the defendant's favor notwithstanding said verdict be and 253 it is hereby denied.

Ordered (2) that defendant's motion for a new trial of this action is also denied.

Dated at St. Paul, June 24, A. D. 1915.

WILLIAM LOUIS KELLY,
District Judge.

Memorandum.

This action was tried recently before another judge sitting in Ramsey county. On appeal, the Supreme Court ordered a new trial, 126 Minn. 260. The alleged negligence was the use of a wrench instead of a lever in operating a hydraulic jack. Two young men, the plaintiff and one Larson, as defendant's servants, were engaged in lifting and lowering the front of a locomotive with these powerful jacks.

Just before the accident, when the locomotive stood elevated and supported by these jacks, the plaintiff on the right operated with a lever and Larson, on the left, operated by a wrench, the foreman ordered plaintiff and Larson to take their jacks to the rear of the locomotive. Here the Supreme Court say: "As the plaintiff started to push the block off preparatory to taking his jack away, the front end of the engine dropped or came down,

the castings apparently going into place, and his hand was crushed between the pilot beam and the jack. The claim is that Larson's jack at the left upon which the end of the locomotive rested went down and caused the locomotive end to drop or slip. It is
254 claimed that the jack went down because a wrench was used as a substitute for a lever. There was expert testimony to the effect that when a wrench was so used it was likely to lower of its own weight to a point where it would cause a valve inside the jack to open and then the head of the jack would go down. The ordinary lever had a lug which came against an obstruction and prevented such a result.

The evidence is that Larson's jack, at the time of the foreman's direction to him to take it and go to the rear of the locomotive, was in proper position, with the pilot beam resting upon it. There is no evidence as to the condition of it afterwards. No one saw it go down. There is no evidence as to what became of it. No one knows just how the accident happened."

For the reasons so stated, a majority of the court directed a new trial.

The undersigned did not preside at the former trial and finds it therefore more difficult to as clearly distinguish this, from the first. On this trial the jury had, not only the testimony of Larson, but also that of Joseph Lang and Frank Martin (witnesses who did not testify at the first trial.) Each of these last, swear that at or near about the time of the accident he saw that the Larson jack, on the left side, was down. Lang adds, that the wrench was still in the jack, when he saw it.

Unless the learned justices of the Supreme Court when they said, referring to this jack used by Larson, "No one saw it go down"
255 meant, that only proof from an eye-witness would be sufficient, it seems to me the testimony at this trial supports the verdict.

There was no error in the court ruling out testimony as to a test claimed to have been made at Marshalltown, Iowa, after the accident. The evidence failed to make it a case to use the court's discretion. But at defendant's request I permitted the use before the jury of two hydraulic jacks, claimed to be the same or exactly similar to the ones used at the accident; and to show their relative operation and whether or not the "wrench" would come down of its own weight, while the "lever" would not, permitted them to be so used.

The jury at the first trial awarded plaintiff \$8,750, at this \$8,000, and the court cannot say it was excessive.

The court finds no error at the trial.

KELLY, J.

GEORGE H. WINTERS, Plaintiff,
 vs.
 MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Notice of Appeal.

To Messrs. Barton & Kay, Attorneys for plaintiff, and Matt Jensen, Clerk of said District Court:

You will please take notice that the defendant appeals to the Supreme Court of the state of Minnesota from an order denying defendant's motion for judgment notwithstanding the verdict or for new trial, said order being made, entered and filed in
 256 the above entitled action, on the 24th day of June, 1915.

W. H. BREMNER,
 F. M. MINER,
 Attorneys for Defendant.

Due and legal service of the above notice is hereby admitted this 29th day of June, 1915.

BARTON & KAY,
 Attorneys for Plaintiff.
 MATT JENSEN,
 Clerk of District Court.

Endorsed: Filed June 29, 1915. Matt Jensen, Clerk, by G. P. Ritt, Deputy.

257 STATE OF MINNESOTA,
 County of Ramsey:

District Court, Second Judicial District.

GEORGE H. WINTERS, Plaintiff,
 vs.
 THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Bond on Appeal.

Know all men by these presents, that we, The Minneapolis & St. Louis Railroad Company, as principal, and United States Fidelity and Guaranty Company, as surety, are bound and firmly held unto the plaintiff in the above entitled action, in the sum of Eight Thousand Dollars (\$8,000.00) to the payment of which to the said George Winters, his heirs, executors, or administrators or assigns, we jointly and severally bind ourselves, our executors or assigns.

The condition of this obligation is such, that,

Whereas, the said The Minneapolis & St. Louis Railroad Company, defendant in the above entitled action, has appealed to the Supreme Court from an order overruling defendant's motion for judgment notwithstanding the verdict or for a new trial, said order having been entered in said action on the 24th day of June, 1915.

Now therefore, if the appellant shall pay all the costs of said appeal, and the damage sustained by the respondent in consequence thereof, if said order or any part thereof is affirmed, or said appeal dismissed, and abide and satisfy the judgment or order which the appellate court may give therein, then this obligation which is given in pursuance of Section 8003 of the General Statutes 1913, shall be void, otherwise to remain in full force and effect.

In testimony whereof we have hereunto set our hands this 26th day of June, 1915.

THE MINNEAPOLIS & ST. LOUIS
RAILROAD CO.,

By W. H. BREMNER, [SEAL.]
General Solicitor.

UNITED STATES FIDELITY AND
GUARANTY CO.,

By WIRT WILSON AND
GEORGE E. MURPHY, [SEAL.]
Its Attorney-in-Fact.

In presence of

E. S. REDEL.
MAXWELL SLESSMAN.
M. V. FORSTER.

258 STATE OF MINNESOTA,
County of Hennepin, ss:

On this 26th day of June, 1915, before me appeared W. H. Bremner to me personally known, whom being by me duly sworn, did say that he is the General Solicitor of The Minneapolis & St. Louis Railroad Company, that the seal affixed to the foregoing instrument was executed in behalf of said corporation, by authority of its board of directors; and said W. H. Bremner acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.]

E. S. REDEL,
Notary Public, Hennepin Co., Minn.

My commission expires June 19, 1917.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 26th day of June, 1915, before me, a Notary Public, within and for said County and State, personally appeared Wirt Wilson and George E. Murphy, to me personally known, who being by me duly sworn upon oath say that they are the Agents and Attorneys-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said Wirt Wilson and George E. Murphy did acknowledge

that they executed the said instrument as the free act and deed of said Company.

MAXWELL SUSSMAN,
Notary Public, Hennepin County, Minnesota.

My Commission expires November 18th, 1920.

259

Return to Supreme Court.

STATE OF MINNESOTA,
County of Ramsey:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original Notice of Appeal and Bond, in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said Court, at St. Paul, this 29th day of June A. D. 1915.

[SEAL.]

(Signed)

(Signed)

MATT JENSEN, Clerk,
By G. P. RITT,
Deputy Clerk.

Endorsed: Filed Aug. 2, 1915. I. A. Caswell, Clerk.

260

Assignments of Error.

1. That the damages are excessive, appearing to have been given under the influence of passion or prejudice.

2. That the verdict is not justified by the evidence and is contrary to law.

3. That the court erred in overruling defendant's objection to the following question:

"Q. Supposing that engine was standing in the roundhouse at Marshalltown, Iowa, the wheels all on the driving-wheels, and the rear of the engine was resting upon four screw jacks placed underneath the iron that runs across the rear of the rear part of the engine, two of the screw jacks being on one side and two on the other, and the front of the engine had been raised up by two hydraulic jacks of the kind this is here in court, one of those hydraulic jacks on either side of it and under the ends of the pilot beam, so that the engine was so resting upon those screw jacks at the rear and the two hydraulic jacks at the front, and that the hydraulic jack on the right side had been lowered so that it was free from the pilot beam, and that a wrench similar to Exhibit B here had been used in this jack

on the left-hand side when it was last pumped up, and that wrench had been left in the jack when so last pumped up, would that open-end wrench so left in settle down of its own accord and trip that jack?"

4. That the court erred in denying defendant's motion made at the close of plaintiff's case to dismiss this action upon the grounds therein stated, to-wit:

"That upon the whole proof at the close of the plaintiff's testimony, no negligence on the part of the defendant has been shown as the proximate cause of the injury which the plaintiff sustained; and upon the further ground that it appears incontestably here that the plaintiff assumed the risk of the exact consequence that came from his act. That he admitted he fully appreciated the danger and knew that if the engine came down his hand would be crushed; that he knew that when he put his hand in to shove the block off from the top of the jack, and that he comprehended that the engine, if it came into place, would necessarily catch his hand by the coming down of the pilot beam, and that it would crush it. And upon the further ground that the plaintiff was guilty of contributory negligence and that such negligence and want of care was a contributing and proximate cause of the injury which he received."

261 5. That the court erred in sustaining plaintiff's objection to the proof offered by defendant, showing tests made with the jack and an open-end wrench upon the engine upon which plaintiff was working at the time he received his injuries, such proof showing that the same jack, in the same position, under the end of the pilot beam of the same engine; that the corner of the engine was raised by the power of the jack, and that the open ended wrench was left in the jack. That the jack was left permanent in that position for more than one hour without going down, and that it required the application of an additional force on the open end of the wrench as it was left in the jack, equaling more than 160 pounds, in order to cause the open end of the wrench to lower sufficiently to trip the jack and cause the same to go down.

6. That the court erred in denying defendant's motion made at the close of all the testimony to direct a verdict in its favor, for the reasons and upon the ground set forth in assignment of error number 4.

7. That the court erred in instructing the jury in the following particular, to-wit:

"Under the practice of law of this state, the jury, when their verdict is unanimous, will bring a verdict signed by your foreman. If, however, after being twelve hours in consultation after you go out with this case, you are unable to make an unanimous verdict, then any ten or eleven of your number may determine what the verdict should be, and those ten or eleven will each sign his individual name to that verdict."

That such instruction was erroneous because this action was founded upon the Federal Employers' Liability Act and deproved

appellant of rights guaranteed to it by the Constitution and laws of the United States.

W. H. BREMNER,
F. M. MINER,
Attorneys for Appellant.

Filed Oct. 29, 1915. I. A. Caswell, Clerk.

262

GEORGE H. WINTERS, Respondent,

v.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Syllabus.

1. The evidence was sufficient to go to the jury upon the question whether or not the defendant was negligent in using a wrench in a hydraulic jack, instead of a lever; and whether or not such negligence resulted in injury to the plaintiff.

2. The court did not err in rejecting evidence offered by the defendant as to experiments made with a jack and a lever on the day following the injury.

Order affirmed.

Opinion.

Action to recover damages sustained by the plaintiff while in the employ of the defendant. A verdict was had for the plaintiff. The defendant appeals from the order denying its alternative motion for judgment or for a new trial.

1. The case was here before and is reported in 126 Minn. 260, 148 N. W. 106. The facts of the case are there stated in detail. It is unnecessary to repeat them. The evidence, with some exceptions, is the same on both appeals; and but one material question, not determined on the former appeal, is before us.

In the former case, on the pivotal question involved on the appeal, the court said:

"The evidence is that Larson's jack, at the time of the foreman's direction to him to take it and go to the rear of the locomotive, was in proper position, with the pilot-beam resting upon it. There is no evidence as to the condition of it afterwards. No one saw it go down. There is no evidence as to what became of it. No one knows just how the accident happened.

"Conceding that the defendant was negligent in permitting the use of a wrench in lieu of a lever, we are unable to say that a jury could reasonably find that such negligence accounts for the plaintiff's injury. At the most such a finding is but a conjecture. It was just as likely a mere accident.

"The court was in error in submitting the case to the jury upon the ground stated. The case is not one for judgment notwithstanding the verdict. There should be a new trial."

The case was reversed because of the failure of the evidence to show

that the negligent use of a wrench in lieu of a lever caused Larson's jack to go down thereby causing the injury. So far as the evidence showed the front end of the locomotive might have gone down accidentally. There was no proof that the use of the wrench was the cause of the locomotive end dropping or slipping. On the second trial additional witnesses were produced. They gave evidence from which it might be concluded that the jack went down as a result of the negligent use of the wrench, the locomotive end following it; and that it did not go down from some accidental cause. The evidence now removes the cause of the injury from the realm of mere conjecture to the domain of legitimate inference from evidentiary facts.

2. After the accident the defendant performed experiments with a jack and an open-ended wrench. The results of such experiments were sought to be proved but were excluded by the court. Error is based upon the court's ruling. The experiments were necessarily made under conditions differing from those which obtained at the time of the injury. At most the receiving of this proof was discretionary with the trial court. It was not error to reject the proffered evidence.

Order affirmed.

SCHALLER, J.

264 STATE OF MINNESOTA:

Supreme Court.

No. 19480-119.

GEORGE H. WINTERS, Respondent,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Opinion and Syllabus.

Filed November 19, 1915. I. A. Caswell, Clerk. Schaller, J.

265 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1915.

No. 119.

GEORGE H. WINTERS, Respondent,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause November 30, A. D. 1915.

It is here and hereby determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County

of Ramsey be and the same hereby is in all things affirmed. And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Thirty-four and 50/100 Dollars, (\$34.50) cost and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed November 30, A. D. 1915.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs \$25.00, Printer \$9.50, Clerk \$—, Acknowledgments \$—, Return \$—, Postage and Express \$—, Filing Mandate \$—, Total \$34.50.

266 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, November 30, A. D. 1915.

[SEAL.]

I. A. CASWELL, *Clerk.*

STATE OF MINNESOTA,
Supreme Court:

Transcript of Judgment.

Filed November 30, A. D. 1915. I. A. Caswell, Clerk.

267 STATE OF MINNESOTA:

Supreme Court.

No. 19480.

GEORGE H. WINTERS, Respondent,
vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Judgment Roll.

Filed November 30, 1915. I. A. Caswell, Clerk.

268

STATE OF MINNESOTA,
Supreme Court, ss:

Mandate.

The State of Minnesota to the Hon. Judge and Officers of the Second Judicial District sitting within and for the County of Ramsey, Greeting:

Whereas, lately in your Court, in an action therein pending, between George H. Winters, Plaintiff and Minneapolis & St. Louis Railroad Company Defendant a certain order was entered therein June 24, 1915 from which action of your Court an appeal thereafter was taken to this Court;

And whereas, the same was duly argued, heard and submitted; and after mature deliberation thereupon had, our Supreme Court did adjudge, determine, decree and order "that the order of the Court below herein appealed from, be, and the same hereby is, in all things affirmed and that judgment be entered accordingly." A copy of the entry of Judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

Now, therefore, this mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, the Hon. Calvin L. Brown, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this 30th day of November 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk of the Supreme Court,
By ———, Deputy.

(Endorsed:) Filed Nov. 30, 1915. N. C. Robinson Clerk, by G. A. Johnson, Deputy.

269

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

No. 112152.

GEORGE H. WINTERS, by CAPITAL TRUST COMPANY, His Guardian
ad Litem, Plaintiff,
against

MINNEAPOLIS & ST. LOUIS RAILROAD CO., Defendant.

Pursuant to the verdict of the jury duly rendered and filed in the
above entitled action on the 24th day of March A. D. 1915,

Now, on motion of Messrs Barton & Kay said Attorneys,

It is hereby adjudged that the plaintiff herein recover of said
Defendant Minneapolis & St. Louis Railroad Company the sum of
Eighty-three hundred twenty-eight Dollars damages, with One
hundred forty and 10/100 Dollars costs and disbursements, in all
amounting to \$8468.10.

Signed this 30th day of November, A. D. 1915.

(Signed.)

N. C. ROBINSON, Clerk,

(Signed.)

By G. A. JOHNSON,

Deputy Clerk.

Endorsed: Filed 30 day of November, A. D. 1915. N. C.
Robinson, Clerk, by G. A. Johnson, Deputy Clerk. Barton & Kay,
Plaintiff's Attorneys. 538 I. I.

270 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

GEORGE H. WINTERS, Plaintiff,

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Notice of Appeal.

To Barton & Kay, Attorneys for Plaintiff, and N. C. Robinson, Clerk
of said District Court:

You will please take notice, that the defendant appeals to the Su-
preme Court of the State of Minnesota from the judgment, and the
whole thereof, entered herein on the 30th day of November, 1915.

W. H. BREMNER,

F. M. MINER,

Attorneys for Defendant and Appellant.

Service of the above entitled notice is hereby admitted this 8th day of December, 1915.

BARTON & KAY,
Attorneys for Plaintiff.

Filed —
N. C. ROBINSON,
Clerk of District Court.

Endorsed: Filed Dec. 17, 1915. N. C. Robinson, Clerk, by G. P. Ritt, Deputy.

271 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

GEORGE H. WINTERS, Plaintiff,

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Bond on Appeal.

Know all men by these presents, that we, The Minneapolis & St. Louis Railroad Company, as principal, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the plaintiff in the above entitled action, in the sum of Ten thousand Dollars (\$10,000.00) to the payment of which to the said George H. Winters, his heirs, executors or administrators or assigns, we jointly and severally bind ourselves, our executors or assigns.

The condition of this obligation is such that,

Whereas, the said The Minneapolis & St. Louis Railroad Company, defendant in the above entitled action, has appealed to the Supreme Court from a judgment entered against it in said action on the 30th day of November 1915, for the sum of eight thousand, four hundred and sixty-eight dollars and ten cents (\$8468.10) damages, interest and costs.

Now therefore, if the appellant shall pay all the costs of said appeal and the damages sustained by the respondent in consequence thereof, if said judgment or any part thereof is affirmed, or said appeal dismissed, and abide and satisfy the judgment or order which the Appellate Court may give therein, then this obligation, which is given in pursuance of Section 8003 of the General Statutes of 1913, shall be void; otherwise to remain in full force and effect.

In testimony whereof, we have hereunto set our hands this 15th day of December 1915.

THE MINNEAPOLIS & ST. LOUIS
RAILROAD COMPANY,

By F. M. MINER, *General Attorney.*

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

By WIRT WILSON AND
GEORGE E. MURPHY,

Its Attorneys-in-Fact.

In presence of

E. S. REDEL.
MAXWELL SUSSMAN.
L. O'DONNELL.

272 STATE OF MINNESOTA,
County of Hennepin, ss:

On this 15 day of December 1915, before me appeared F. M. Miner, to me personally known, who being by me duly sworn, did say that he is the General Attorney of the Minneapolis & St. Louis Railroad Company, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its board of directors; and said F. M. Miner acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.]

E. S. REDEL,
Notary Public, Hennepin County, Minnesota.

My Commission expires June 19, 1917.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 15th day of December 1915, before me, a Notary Public within and for said County and State, personally appeared Wirt Wilson and George E. Murphy, to me personally known, who being by me duly sworn upon oath did say that they are the Agents and Attorneys-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of the said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said Wirt Wilson and George E. Murphy, did acknowledge the said instrument as the free act and deed of said Company.

[NOTARIAL SEAL.]

MAXWELL SUSSMAN,
Notary Public, Hennepin County, Minnesota.

My Commission expires Nov. 18th, 1920.

"Endorsed."

The within bond and surety therein are hereby approved this 17th day of December, 1915.

FREDERICK N. DICKSON,
District Judge.

Filed Dec. 18, 1915. N. C. Robinson, Clerk, by G. P. Ritt, Deputy.

273

Return to Supreme Court.

STATE OF MINNESOTA,
County of Ramsey:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court, Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original notice of appeal and bond, in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said Court, at St. Paul, this 17th day of December A. D. 1915.

[SEAL.]

(Signed)

(Signed)

N. C. ROBINSON, *Clerk*,
G. P. RITT, *Deputy Clerk*.

Endorsed: Filed Dec. 21, 1915. I. A. Caswell, Clerk.

274 STATE OF MINNESOTA,
Supreme Court:

GEORGE H. WINTERS, Respondent,

VS.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Stipulation.

It is hereby stipulated by and between the parties hereto by their respective attorneys that the appeal in the above entitled action in this court from the judgment rendered upon verdict in the District Court of Ramsey County be submitted to this court on or before Jan'y 10th, 1916 on the briefs heretofore filed and the arguments heretofore presented to this court, on behalf of the respective parties.

Dated this 24th day of December, 1915.

(Signed)

(Signed)

W. H. BREMNER,
F. M. MINER,
Attorneys for Appellant.
BARTON & KAY,
Attorneys for Respondent.

Endorsed: Filed Jan. 7, 1916. I. A. Caswell, Clerk.

275

Ramsey County.

Jan. 21, 1916.

19706-264.

GEORGE H. WINTERS, Respondent,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Per CURIAM:

This is an appeal from a judgment rendered on the verdict of the jury after the affirmance by this court of an order denying a new trial. The cause is now submitted by the parties upon the record and briefs presented on the former appeal. Now, after due consideration, it is ordered, for the reasons stated in our former opinion in the case, that the judgment appealed from be and the same is hereby in all things affirmed.

(Endorsed:) Filed January 21, 1916. I. A. Caswell, Clerk.

276 STATE OF MINNESOTA:

In Supreme Court, October Term, 1915.

GEORGE H. WINTERS, by CAPITAL TRUST COMPANY, His Guardian
ad Litem, Respondent,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

It is hereby stipulated by and between the parties to the above entitled action that judgment may be entered in said Court in favor of said Respondent and against said Appellant for the sum of Eight Thousand Five Hundred Seventy-seven Dollars and seventy-eight cents (\$8,577.78).

(Signed)

(Signed)

BARTON & KAY,
Attorneys for Respondent.
W. H. BREMNER &
F. M. MINER,
Attorneys for Appellant.

Endorsed: Filed Feb. 3, 1916. I. A. Caswell, Clerk.

277 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1915,

No. 264.

GEORGE H. WINTERS, Respondent,

VS.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause January 21, A. D. 1916.

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things affirmed. And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Eight Thousand Five Hundred Seventy-seven and 78/100 dollars (\$8,577.78) including costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed February 3, A. D. 1916.

By the court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs \$—, Printer \$—, Clerk \$—, Acknowledgments \$—, Return \$—, Postage and Express \$—, Filing Mandate \$—, Stipulated Total \$8,577.78.

278 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul February 3, A. D. 1916.

[SEAL.]

I. A. CASWELL, *Clerk.*

STATE OF MINNESOTA:

Supreme Court.

Transcript of Judgment.

Filed February 3, A. D. 1916. I. A. Caswell, Clerk.

279 STATE OF MINNESOTA:

Supreme Court.

No. 19706.

GEORGE H. WINTERS, Respondent,
vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Judgment Roll.

Filed February 3, 1916. I. A. Caswell, Clerk.

280 STATE OF MINNESOTA,
Supreme Court, as:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of George H. Winters, Respondent, vs. Minneapolis & St. Louis Railroad Company, Appellant, and also of the opinions of the court rendered therein together with the assignment of errors, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 8th day of March, 1916.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

281 In Supreme Court.

GEORGE H. WINTERS, Respondent,
vs.

The MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Assignment of Errors.

Comes now the Appellant and files the following assignment of errors upon which it will rely upon its prosecution of its Writ of Error in the above entitled cause:

1. That the Supreme Court of the State of Minnesota erred in

affirming the decision of the District Court of Ramsey County, Minnesota, denying Appellant's motion in the alternative for judgment notwithstanding the verdict or to set aside the verdict and grant a new trial, and in holding and decreeing that the Respondent, George H. Winters, was entitled to recover from the Appellant, The Minneapolis & St. Louis Railroad Company.

2. That the Supreme Court of the State of Minnesota erred in finding, holding and decreeing that the Appellant, The Minneapolis & St. Louis Railroad Company was not entitled to judgment in its favor notwithstanding the verdict.

3. That the Supreme Court of the State of Minnesota erred in holding, and decreeing that the Appellant, The Minneapolis & St. Louis Railroad Company was not entitled to a new trial.

4. That the Supreme Court of the State of Minnesota erred in holding and decreeing and reaffirming its former opinion by affirming the judgment rendered in the District Court of the State of Minnesota in favor of said Respondent and against the Appellant.

5. That the Supreme Court of the State of Minnesota erred in entering final judgment in said court in favor of said Respondent and against this appellant.

6. That the Supreme Court of the State of Minnesota erred in holding and decreeing that as matter of law, upon the stipulation as to the work which the engine involved was doing before and after the repairs were made, the Respondent Winters at the time of receiving his injury was performing work connected with, growing out of or relating to interstate commerce and was therefore within the provisions of the act, and that the court erred in refusing to hold that the Respondent Winters upon his own testimony as to the knowledge possessed by him as to the probabilities of injury on account of the manner in which he performed the work did not assume the risk of the injury which he received as a matter of law and in holding and decreeing that the question of such assumption of risk under the evidence was one of fact to be passed upon by the jury, thereby depriving the Appellant of a right guaranteed to it under the provisions of the act of Apr. 22, 1908 commonly known as the Employers' Liability Act and amendments thereto as construed by the judgments of this court.

7. That the Supreme Court of Minnesota erred in holding and decreeing that upon the whole proof produced upon the trial, there was sufficient evidence of negligence on the part of the Appellant Railroad Company to send to the jury the question of such negligence; that because of an entire want of competent proof of facts from which the negligence of the Appellant could be found, the Supreme Court of Minnesota erred in holding and decreeing that the question of Appellant's negligence was properly submitted by the trial court to the jury, for the reason that such negligence was wholly insufficient to sustain a finding of fact that the Appellant was negligent with respect to the appliances furnished by it for the doing of the work in hand at the time said Winters received injury and by so doing, the court deprived the Appellant of a right secured

to it by that act of Apr. 22, 1908 commonly known as the Employers' Liability Act and amendments thereto.

8. That the court erred in holding and decreeing that the following instruction objected to by the Appellant was a proper statement of the law governing the deliberations of said jury, 283 said instruction being as follows:

"Under the practice law of this state, the jury, when their verdict is unanimous, will bring in a verdict signed by your foreman. If, however, after being twelve hours in consultation after you go out with this case, you are unable to make an unanimous verdict, then any ten or eleven of your number may determine what the verdict should be, and those ten or eleven will each sign his individual name to that verdict."

W. H. BREMNER,

F. M. MINER,

Attorneys for Appellant and Plaintiff in Error.

[Endorsed:] 19706. Original. In Supreme Court. George H. Winters, Respondent, vs. The Minneapolis & St. Louis Railroad Company, Appellant. Assignment of errors. Filed Feb. 26, 1916. I. A. Caswell, Clerk.

284

In Supreme Court.

GEORGE H. WINTERS, Respondent,

vs.

The MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Petition For Writ of Error.

To the Honorable Chief Justice of the Supreme Court of Minnesota:

Comes now the appellant in the above entitled cause and respectfully shows:

That on the 19th day of November, 1915, the above entitled court handed down its decision in the above entitled case affirming the order entered in said case in the District Court of Minnesota in and for Ramsey County, denying Appellant's motion in the alternative for judgment in its favor notwithstanding the verdict or for a new trial, from which court the appeal to this court was prosecuted; that thereafter a remittiture was sent from this court to said District Court of Ramsey aforesaid and on the 30th day of November 1915 the said District Court of Ramsey entered judgment upon the verdict in this cause in favor of the said Respondent and against the said Appellant for the sum of Eight thousand, four hundred and sixty-eight dollars and ten cents (\$8,468.10), damages, interest and costs; that thereafter and on the 7th day of December, 1915, said Appellant appealed from said judgment so rendered in said District Court of Ramsey County to this court, and on the 21st of January, 1916, this court rendered a Per Curiam

opinion wherein upon the entire record of above appeals and its former opinion it affirmed said judgment, and thereupon the clerk of this court on said day entered judgment herein in favor of said Respondent and against this Appellant for the sum of—; that said decision and judgment are final as to the rights of the

parties in this case; that the said The Minneapolis & St. Louis Railroad Company, Appellant, was and is aggrieved in that in said decision and judgment and in the proceedings had prior thereto in this case certain errors were committed to its prejudice; that this is an action arising under certain statutes of the United States, viz: the act of Apr. 22, 1908, 35 U. S. Stat. at Large 65, Chap. 149, being an act relating to the liability of common carriers by railroads to their employes in certain cases and commonly known as the "Employers' Liability Act"; together with all amendments to said acts and each thereof passed by Congress since said statutes were first enacted; that because of the construction given by this court to said statutes and each of them, certain rights and titles claimed by the Appellant under and pursuant to said statutes referred to were denied to it and the decision of this court is against the said title and rights so claimed by the said The Minneapolis & St. Louis Railroad Company, Appellant, and, as it believes, contrary to the said statutes of the United States and the proper construction thereof.

That the above entitled court is the highest court of the State of Minnesota in which a decision could be had in this case and that the decision and judgment so rendered and entered by the Supreme Court of Minnesota is unwarranted in law as Appellant is advised.

Appellant presents herewith an Assignment of Errors and a Bond in proper form and prays for an order allowing said Appellant to prosecute a Writ of Error in this case to the Supreme Court of the United States under and in accordance with the laws of the United States in that behalf made and provided; and that an order be entered herein staying all further proceedings in this cause until the determination of said Writ of Error.

W. H. BREMNER,
F. M. MINER,
Attorneys for Appellant.

Writ of Error allowed this 25th day of Feb'y, 1916.

CALVIN L. BROWN,
Chief Justice, Supreme Court of Minnesota.

[Endorsed:] 19706. Original. In Supreme Court. George H. Winters, Respondent, vs. The Minneapolis & St. Louis Railroad Company, Appellant. Petition for writ of error. Filed Feb. 26, 1916. I. A. Caswell, Clerk.

286

Original.

GEORGE H. WINTERS, Respondent,

vs.

The MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appella

Bond on Writ of Error.

Filed Feb. 26, 1916. I. A. Caswell, Clerk.

287 STATE OF MINNESOTA,

In Supreme Court.

GEORGE H. WINTERS, Respondent,

vs.

The MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Bond on Writ of Error.

Know all men by these presents, that we, The Minneapolis & St. Louis Railroad Company, a Minnesota corporation, as principal, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto George H. Winters in the full and just sum of Ten thousand (\$10,000.00) dollars, to be paid to the said George H. Winters, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 3rd day of February, A. D. 1916.

Whereas lately at a session of the Supreme Court of the State of Minnesota in a suit pending in said court between George H. Winters, Respondent, and The Minneapolis & St. Louis Railroad Company, Appellant, a final judgment was rendered against the said appellant, and the said The Minneapolis & St. Louis Railroad Company, Appellant, having obtained from said court a Writ of Error to reverse the judgment in the aforesaid suit, and a citation addressed to the said George H. Winters is about to be issued citing and admonishing him to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date thereof.

Now the condition of the above application is such that if the said The Minneapolis & St. Louis Railroad Company shall prosecute its Writ of Error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make this appeal

288 good, then the above obligations to be void, otherwise to remain in full force and virtue.

THE MINNEAPOLIS & ST. LOUIS
RAILROAD COMPANY,

(Signed) By F. M. MINER, *General Attorney.*

THE UNITED STATES FIDELITY &
GUARANTY COMPANY,

(Signed) By WIRT WILSON AND

(Signed) GEORGE E. MURPHY,

Its Attorneys-in-Fact.

MAXWELL SUSSMAN.

B. W. SCALLEN.

Bond approved and stay of further proceedings herein ordered.
(Signed) CALVIN L. BROWN,

Chief Justice of the Supreme Court of Minnesota.

STATE OF MINNESOTA,

County of Hennepin, ss:

On this 3rd day of February, A. D. 1916, before me a Notary Public within and for said County and State, personally appeared F. M. Miner, to me personally known, who being by me duly sworn, did say that he is the General Attorney of The Minneapolis & St. Louis Railroad Company, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its Board of Directors; and said F. M. Miner acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.]

E. S. REDEL,

Notary Public, Hennepin County, Minn.

My commission expires June 19, 1917.

STATE OF MINNESOTA,

County of Hennepin, ss:

On this third day of February 1916, before me, a Notary Public within and for said County and State, personally appeared Wirt Wilson and George E. Murphy, to me personally known, who being by me duly sworn upon oath did say that they are the Agents and Attorneys-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of the said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said Wirt Wilson and George E. Murphy did acknowledge that they executed the said instrument as the free act and deed of said Company.

(Signed)

MAXWELL SUSSMAN,

Notary Public, Hennepin County, Minnesota.

My commission expires Nov. 18th, 1920.

289 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment on an appeal which is in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Minneapolis & St. Louis Railroad Company, Appellant and Plaintiff in Error and George H. Winter, Respondent and Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, and of an authority exercised under said statute on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision was in favor of such their validity or wherein was drawn in question the validity of a treaty or statute of, and of authority exercised under the laws of the United States, and the decision was against their validity; or wherein was drawn in question the construction of a clause of the constitution or a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under said clause of the constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said The Minneapolis & St. Louis Railroad Company as by its complaint appears.

We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you may have the same at Washington within thirty days (30) from the date thereof in the said Supreme Court; that the record
290 and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the constitution and the laws of the United States should be done.

Witness, The Honorable Edward Douglass White, Chief Justice of the United States this 26th day of February, 1916.

Done in the City of St. Paul, County of Ramsey, under the seal of the District Court of the United States for the District of Minnesota, attached.

[Seal, U. S. District Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,

*Clerk of the District Court of the United States,
for the District of Minnesota.*

Allowed by:

CALVIN L. BROWN,

Chief Justice of the Supreme Court of Minnesota.

Service of the within Writ of Error, and receipt of a copy thereof admitted this 26th day of Feb., 1916.

BARTON & KAY,

Solicitor for George H. Winters, Defendant in Error.

[Endorsed:] 19706. Original. In Supreme Court. George H. Winters, Respondent, vs. The Minneapolis & St. Louis Railroad Company, Appellant. Writ. Filed Feb. 26, 1916. I. A. Caswell, Clerk.

291 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of the said court, do hereby certify that there was lodged with me as such clerk on February 26, 1915, in the matter of George H. Winters, Respondent, vs. Minneapolis & St. Louis Railroad Company, Appellant.

1. The original bond of which a copy is herein set forth;
2. Copies of the writ of error, as herein set forth,—one for each defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 8th day of March, 1916.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,

Clerk Supreme Court of Minnesota.

292 UNITED STATES OF AMERICA, ss:

The President of the United States to George H. Winters, Greetings:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Minnesota, wherein The Minneapolis & St. Louis Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decision rendered against the said plaintiff in error, as in the Writ of Error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, The Honorable Calvin L. Brown, Chief Justice of the Supreme Court of the State of Minnesota, this 25th day of February, A. D. 1916.

CALVIN L. BROWN,

Chief Justice of the Supreme Court of Minnesota.

Service of the within citation and receipt of a copy thereof admitted this 26 day of February, A. D. 1916.

BARTON & KAY,

*Solicitor for George H. Winters,
Defendant in Error, St. Paul, Minn.*

[Endorsed:] 19706. Original. In Supreme Court. George H. Winters, Respondent, vs. The Minneapolis & St. Louis Railroad Company, Appellant. Citation. Filed Feb. 26, 1916. I. A. Caswell, Clerk.

293 STATE OF MINNESOTA:

In Supreme Court.

GEORGE H. WINTERS, Respondent,

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Præcipe for Transcript on Appeal.

I. A. Caswell, Clerk of the Supreme Court of the State of Minnesota:

In preparing the transcript in the above entitled cause for transmission to the Supreme Court of the United States in pursuance of the Writ of Error allowed in said cause you will please include therein the entire record as found in your office.

W. H. BREMNER,

F. M. MINER,

Solicitors for Appellant and Plaintiff in Error.

Service of the within Præcipe and receipt of copy thereof admitted this 26th day of Feb., A. D. 1916.

BARTON & KAY,

Solicitors for George H. Winters,

Respondent and Defendant in Error.

[Endorsed:] 19706. Original. In Supreme Court. George H. Winters, Respondent, vs. The Minneapolis & St. Louis Railroad Company, Appellant. Præcipe for transcript on appeal. Filed Feb. 26, 1916. I. A. Caswell, Clerk.

294 UNITED STATES OF AMERICA,

Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, at my office, in the city of St. Paul, Minnesota, this 8th day of March, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,

Clerk Supreme Court of Minnesota.

Endorsed on cover: File No. 25,195. Minnesota Supreme Court. Term No. 912. The Minneapolis & St. Louis Railroad Company, Plaintiff in Error, vs. George H. Winters. Filed March 24, 1916. File No. 25,195.



No. 9 420

FILED
APR 11 1916
JAMES D. MAHER

Supreme Court of the United States

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,
Plaintiff in Error,

vs.

GEO. H. WINTERS,
Defendant in Error.

ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM THIS CAUSE, AND IF DEFENDANT IN ERROR'S MOTION TO THAT END BE DENIED THEN IN OPPOSITION TO THE COURT PLACING THIS CAUSE UPON SUMMARY DOCKET.

WILLIAM H. BREMNER,
FREDERICK M. MINER,
Attorneys for Plaintiff in Error,
Minneapolis, Minnesota.



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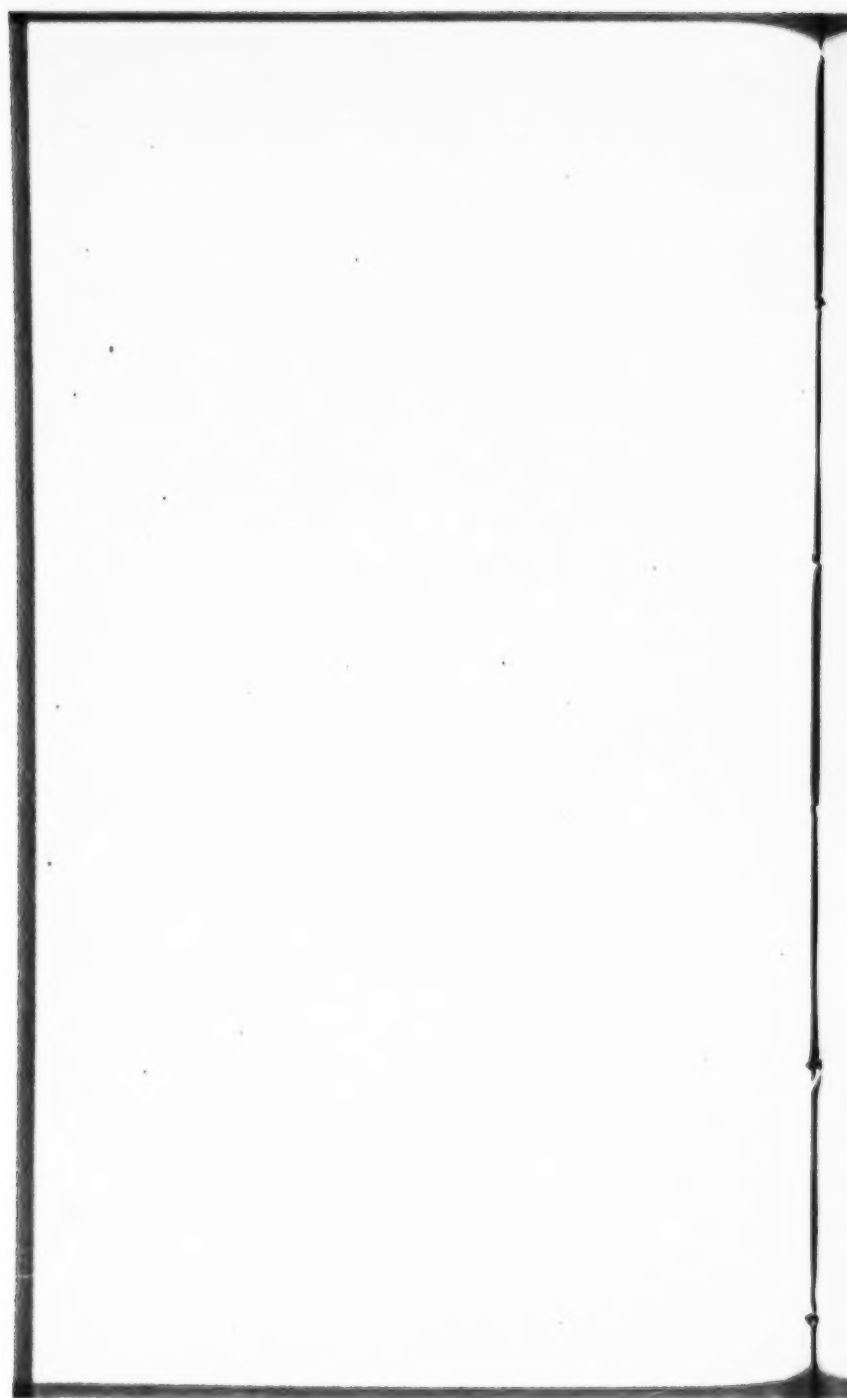
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Supreme Court of the United States

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,

Plaintiff in Error,

VS.

GEO. H. WINTERS,

Defendant in Error.

ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM THIS CAUSE, AND IF DEFENDANT IN ERROR'S MOTION TO THAT END BE DENIED THEN IN OPPOSITION TO THE COURT PLACING THIS CAUSE UPON SUMMARY DOCKET.

Comes now the above named The Minneapolis & St. Louis Railroad Company, plaintiff in error, by its counsel William H. Bremner and Frederick M. Miner, and files this its argument in opposition to the motion in said cause made on behalf of the defendant in error.

The argument herein will attempt to demonstrate that the motion of the defendant in error ought not to be granted by this court upon either or any of the grounds herein alleged.

In order that the court may have a clear apprehension of the questions involved in this matter we deem it necessary to make a more extended reference to the facts as they were developed upon the trial of the action.

We do not wish to take the time of the court by repeating what has been set forth by the defendant in error in his statement of the facts, but there are as it seems to us some additional circumstances that should be called to the attention of the court in order that it may have a more complete understanding with respect to the facts and the merits involved in the questions that are legitimately brought before this court for final determination.

There are three errors involved in this writ of error, each of which we respectfully submit are proper to be pressed upon the attention of this court.

I.

That the district courts of Minnesota are not courts of competent jurisdiction for the trial of actions arising out of the Federal Employers' Liability Act, for the reason that such courts find facts without a common law jury in violation as we claim of the 7th Amendment to the Constitution of the United States.

II.

That the defendant in error, at the time of receiving his injury was not employed in work arising out of, or so connected with the duties of the plaintiff in error with respect to interstate commerce, that defendant in error can be said to have been employed in such commerce at the time of receiving the injury which is the foundation of this suit, and

III.

That upon the testimony given upon the trial of the action the defendant in error assumed the risk of the injury which he received as a matter of law, and that the courts of Minnesota should have so declared, and that in view of the evidence it was error on the part of the trial court and on the part of the Supreme Court of the state to hold that such question was for the jury.

In order that the full effect of the last contention may appear, it will be necessary to acquaint the court more fully with some facts upon the record in addition to those set forth by the defendant in error in his statement of facts beginning at the bottom of page 8 thereof.

The front end of the engine in question when in proper order rested upon a four wheel truck, the frame of which consisted of an immense casting, designated in the testimony as a female casting, weighing altogether something like 1,800 pounds. In the center of this casting was a round hole about twelve inches in diameter and two inches in depth and under the front end of the boiler, securely fastened thereto was another casting with a round two-inch projection below the lower part of the boiler, so that when the engine was properly together ready for service, this casting attached to the boiler would drop into the hole in the casting which composed the frame of the truck spoken of. This male casting spoken of was also of metal and weighed several hundred pounds. It appeared that for the purpose of enabling the men to do the work of putting on the tires upon the four drive wheels of this engine the front of the boiler had been lifted up by power pressure, so that the two castings were discon-

nected, and the front of the boiler was resting while the work was being done, upon a square timber placed across the top of the truck between that and the boiler. There were also several jacks at the rear end of this engine, and in this manner it will be seen that the engine was lifted up off of the rails, so that the men could work freely in removing the old worn tires from the drive wheels and putting on the new ones.

The defendant in error had worked for several years around engines, largely as a boiler makers' helper, and was perfectly familiar with the work which he was doing at the time of receiving his injury. After the tires had been placed upon the drive wheels it was necessary to lower the front of the engine into place, and the hydraulic jacks were used as described by the defendant in error; one each of such jacks was placed under the end of the pilot beam on the front of the engine, and by the operation of such jacks the front of the boiler was raised sufficiently to permit the removal of the timber heretofore spoken of. Upon this being done the jacks were then lowered, when it appeared that in some manner the boiler had swerved slightly to one side, so that the castings heretofore described were slightly out of alignment, and consequently when the jacks were lowered the upper casting firmly attached to the boiler would not enter into the place prepared for it in the casting upon the truck. Upon this fact appearing, defendant in error and the witness Larson spoken of were directed to again raise the front of the engine by the operation of the jacks, which was done, and thereupon no further action with respect to the jack which was operated by young Larson, in connection with which the handle of the wrench was used, took place, until after

the injury of the defendant in error.

During all the time that the defendant in error was raising and lowering the jack operated by him in the effort, as described, to force the boiler over sufficiently so that the castings would properly come into contact, the jack operated by young Larson remained in the position as he had placed it, and so continued during all of the efforts that were made through the use of the other jack in raising and lowering it to get the engine into place.

The defendant in error it will be noted claims that during all of this time the end of the engine was resting upon the jack which had been operated by young Larson, but this is an inaccurate statement as will appear fully from the testimony of defendant in error, his witness Larson and witness Winters, who was the father of the defendant in error. The testimony of all three of these witnesses shows without question that the front of the boiler during this operation was supported and rested upon two points of contact or bearing, one being the outer end of the pilot beam which rested upon the jack operated by young Larson, the other being the edge of the upper casting resting out upon the rim of the lower casting, so that these two points of contact sustained and upheld the weight of the front of the engine.

It appears without contradiction that the defendant in error had full conscious knowledge of what the difficulty was, and of the purpose that was sought to be accomplished in what was done.

After the two castings failed to come into alignment and in proper position as a result of the work done, and after the foreman had directed the two young men to take their jacks from under the pilot beam and carry them to

the rear of the engine, it appears that the defendant in error stood for some considerable time by the side of the jack which he had been operating, doing nothing. Upon the second trial of the cause he testified that he stood idle in this manner for from five to ten minutes. Upon the last trial of the cause he stated that he did not know just how long he stood there idle before attempting to obey the direction of the foreman, but he did not think it was quite that length of time. However that may be, the proof without contradiction shows that after standing idle for some considerable time, and without looking to ascertain whether or not young Larson had started to obey the direction of the foreman, appreciating, as he admitted, fully that if the engine dropped into position and his hand was between the pilot beam and the hydraulic jack it would be crushed; in the full knowledge and realization of these facts, the defendant in error used his hand for the purpose of pushing a block of wood off of the top of the hydraulic jack which he had been using, in so doing placing his hand between the top of the jack and the under surface of the pilot beam of the engine, and just as his hand got in that position, without any warning the engine settled into its proper place by the two castings coming into proper relation, and thus causing the end of the pilot beam, where the defendant in error was working, to drop down sufficiently far so that it crushed his hand between the lower surface of the pilot beam and the top of the hydraulic jack.

The defendant in error claims that the defect in proof which was pointed out by the Supreme Court of the State of Minnesota, in its opinion upon the first appeal in this cause to that court, was supplied by testimony pro-

duced upon the last trial, which testimony it is claimed tended to show that the jack operated by young Larson, after standing in position while all of the work was done as described in the statement of facts, in an attempt to get the two castings involved into alignment, went down and was the proximate cause of his injury. Just the length of time that this took is not clearly shown by the testimony but to supply this defect in proof the defendant in error produced two witnesses, upon the last trial, one Lang and one Martin. We appreciate the fact that this court is not going to decide questions of fact in this matter, and we only call attention to this feature of the cause because the defendant in error has seen fit to print certain of the testimony of these two witnesses in support of the fact alleged by him that the jack went down.

If the court deems this feature of the matter of essential importance, sufficient to read the testimony which it is claimed supplies the defect, we request very earnestly that the court read the cross examination of the witness Lang, for we submit that when considered in its entirety it shows that neither Lang nor Martin contradicted the testimony of young Larson who was operating the jack, that is claimed to have gone down. The testimony of the latter is to the effect that when the front of the engine settled into position by the two castings coming into proper relation, and young Winters got his hand caught, that he was standing right in front of the jack which he had been operating, just in the act of reaching out for the purpose of taking hold of the lever for the purpose of lowering the jack, and at that time the jack was in position exactly as he left it, with the top pressed against the lower surface of the pilot beam and supporting that portion of the weight of the en-

gine. If this is true, and we submit that it is not contradicted by either of the witnesses named, who only saw the condition of the jack after the thing was all over, it simply bears out the contention which plaintiff in error has made at all times in this trial; that the hand of the defendant in error was caught and mangled in the manner shown, not because the jack operated by Larson went down but because the two castings came into proper relation, so that the upper casting entered into its proper place in the lower casting which was entirely sufficient to cause the end of the pilot beam where defendant in error was at work, to drop down the required distance to crush his hand upon the top of the jack.

We have set forth in the appendix certain of the testimony which we feel is relevant to the cause as treated by the defendant in error in this motion, and because we feel that such further testimony is absolutely essential to a fair understanding of the real situation and the real merit that is involved in the question as to whether or not upon the facts which are absolutely without dispute, the defendant in error, under the rules of law as laid down by this court, did not assume the risk of the very consequence which came to him because of his heedlessness and carelessness in performing the direction of the foreman, to take the jack which he had been operating from its position under the pilot beam and carry it to the rear of the engine.

WE RESPECTFULLY SUBMIT THAT DEFENDANT IN ERROR WAS NOT EMPLOYED IN INTERSTATE COMMERCE WHEN HE RECEIVED HIS INJURY.

As before stated the defendant in error was at the time assisting in work upon an engine of the plaintiff in error, which when in service was used in moving both interstate and intrastate commerce.

The fact with reference to this matter will be found stated in the stipulation made between the parties found at the bottom of page 8 and the top of page 9 of the brief of the defendant in error, in support of his motion.

As we understand it this court has held that there is a difference between the making of extensive or heavy repairs and the making of mere temporary or light repairs upon instrumentalities used by carriers in interstate commerce. Take for instance light work done upon an engine during the time that it is engaged in making a run between division terminals, or even at such terminals when the engine is in the round house for the purpose of being cleaned and prepared for another trip, that in such cases it is held that those engaged in such work are employed in interstate commerce, or doing a work so closely connected therewith as to be fairly said to be a part of such commerce. On the other hand that where an instrumentality as the result of long use and wear must be rebuilt, or must have at least substantial repairs made in order that it may be continued as an instrumentality in commerce, and it is taken out of such commerce for the purpose of having such repairs made, that during the time such work is being carried on those employed in such work are not engaged in interstate commerce, or in work

having so close a relation thereto that they may be said to be performing a part of such commerce. It seems to us that this distinction may properly be read out of the various cases in which this court has decided, when employees were and when they were not engaged in such commerce.

In support of his contention that he was at the time injured, engaged in such commerce, the defendant in error cites to the attention of the court the *Walsh case* in 223 United States 1, and *Peterson case* in the 229 U. S. 146.

In the *Walsh case* it appeared that the plaintiff's intestate was engaged in replacing a drawbar on one of defendant's cars, then in use in interstate commerce. As we gather from the facts in this case the car was actually being used in commerce. In any event the record does not show that it had been withdrawn from commerce for the purpose of being rebuilt, and so it seems to us that the case is not an apt authority upon the precise point involved here. Neither can we see that the *Peterson case* touches this question, for the *Peterson case* involved the question of taking material to a bridge carrying tracks over which interstate commerce was carried, for the purpose of repairing the same, and it appears that the structure was still carrying commerce and continued to do so while such repairs were being made.

It seems to us that unless it is to be held that after an instrumentality has once been devoted to commerce it continues in such commerce until it is worn out, that it is not inconsistent to say that although it may have been dedicated to such commerce it may be withdrawn therefrom, so that during the time that it is so withdrawn those working about the same cannot be said to be engaged in

such commerce. Unless what has just been suggested is to be maintained, it seems to us that in principle there can be no difference whether an instrumentality is being created with the intention of afterwards devoting it to the purposes of interstate commerce, or whether after being so applied it is withdrawn and its use as such is suspended because of the necessities of reconstruction on account of wear, breakage or from any other cause.

We suggest that the recent case of *Shanks v. D. L. & W. R. Co.*, 239 U. S. 556, and *Cousins v. Illinois Central Ry. Co.* (unreported), are very much nearer in point upon the question now being considered.

See also:

Jackson v. C. M. & St. P. R. Co., 210 Fed. 495.

G. H. & S. A. Ry. Co. v. Chojnacky, 163 S. W. 1011.

THE DISTRICT COURTS OF MINNESOTA ARE NOT COURTS OF COMPETENT JURISDICTION TO TRY ACTIONS FOUNDED UPON THE FEDERAL EMPLOYERS LIABILITY ACT, FOR THE REASON THAT THEY FIND FACTS WITHOUT A COMMON LAW JURY, THEREBY DEPRIVING THE PLAINTIFF IN ERROR OF A RIGHT SECURED TO IT BY THE 7TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

This is the third time this cause has been tried. Upon the first trial the cause was dismissed by defendant in error at the close of his testimony; the second trial resulted in a verdict for the defendant in error. As shown by the brief for the defendant in error at page 13 the result of the second trial upon due proceedings had, was taken to the Supreme Court of the State of Minnesota. At the top of page 13 the defendant in error sets forth the result upon

this particular question reached in that court. In other words, the Supreme Court of Minnesota upon the first appeal of this cause considered the federal question presented and decided it adversely to the contention of plaintiff in error, but reversed the action of the trial court and sent the cause back for another trial.

We assume that it will be admitted under a familiar and repeatedly enforced rule, that the decision of the Supreme Court of Minnesota upon that appeal on that question became the law of the case for the future, so far as the courts of Minnesota were concerned. The defendant in error contends that the question is solely one of procedure and not a matter of substantive right. This plaintiff in error now has a cause before this court involving this very question, number 478 of the October, 1915, term, said cause with several others now before the court having been, by order of the court, advanced to be heard upon this question with number 321. When these cases are reached and disposed of such disposition will be controlling probably in all cases involving a like question.

We do not of course agree with defendant in error that the question is one of procedure which a state may regulate to suit its own idea in administering justice. The plaintiff in error contends that the rights, obligations and remedies involved in the Federal Act spring from and are controlled by the Constitution of the United States; that, therefore, the 7th Amendment of that Constitution applies to all action founded upon the Federal Act, and that all persons subject to the jurisdiction of the United States, who are affected by the Federal Act are protected by the 7th Amendment, as matters of substantive right, and cannot be deprived of that right by any law of a state which

establishes, regulates or controls procedure in the courts of a state.

PLAINTIFF IN ERROR CONTENTS THAT THE DEFENDANT IN ERROR UPON ALL OF THE EVIDENCE WAS SHOWN TO HAVE ASSUMED THE RISK OF THE INJURY RECEIVED BY HIM AS MATTER OF LAW.

Defendant in error states at the bottom of page 16 that the plaintiff in error did not request the trial court to charge the jury as to assumption of risk in any manner whatsoever, and made no request upon any other subject. Defendant in error is correct in saying that no request was made to the court to charge the jury upon the subject of assumption of risk. At the close of all of plaintiff's testimony, however, the plaintiff in error did request the court to dismiss the cause for the reason that it appeared incontestibly that the plaintiff assumed the risk of the exact consequence that came from his act; his testimony being that he fully appreciated that if the engine came down his hand would be crushed. This fact will appear from a copy of the printed record, now on file in this court, at folio 525 thereof. At the close of all the testimony the defendant requested the court to direct a verdict in its behalf upon the ground, among others, that upon the whole case made it appeared conclusively that the defendant in error assumed the risk of the exact consequence that came from his act; that he had admitted that he fully appreciated that if the engine came down his hand would be crushed; that he knew that when he put his hand in to shove the block off from the top of the jack, and that he comprehended that the engine if it came into place would necessarily

crush his hand by the coming down of the pilot beam, on to the top of the jack.

In order that this court may see just the full effect of the request so made we desire to set forth here very briefly the statement of defendant in error upon this vital question. Speaking as to the work that had already been done of putting the tires on and the completion of such work, defendant in error was asked:

“Q. Conn told you to go take your jack to the rear of the engine?

A. Yes, sir.

Q. And you stood there about five minutes?

A. Stood there a little while.

Q. Well, you testified five minutes before; do you want to change that?

A. No, I don't think it was five minutes, but we stood there a little while after that.

Q. Well, the first time you testified you testified it was from five to ten minutes.

A. Well, I don't remember that.

Q. Well, if you did so testify on the first trial, was that true?

A. Well, we didn't stand that long; we stood there awhile, I know. . . .

Q. Well, you stood there some length of time, and then finally you went to work and instead of taking this lever or something else in order to pull that block out, you took your hand and shoved your hand right in on top of that hydraulic jack?

A. Just pushed the block off that way.

Q. Yes, and your hand passed right over the top of that jack?

A. Yes, sir.

Q. And right underneath the pilot beam?

A. Yes, sir.

Q. And you knew if that engine slipped into place that pilot beam would come right down on to your hand, you knew that, didn't you?

A. I didn't know whether it would or not.

Q. You knew if the engine came down it would

come right down on your hand if it was on that jack?

A. Yes, sir. I didn't know it was coming down.

Q. No, you didn't know it was coming down, but you knew if it did come while your hand was on that jack it would come right down on your hand?

A. Yes, sir."

Defendant in error further testified that on this occasion he had worked for the plaintiff in error some considerable length of time; had worked for it on three different occasions including the time when he was injured; had worked for the Chicago Great Western for some considerable time and during all of his work his duties were in connection with the work performed about engines, so that he was fully advised and thoroughly familiar with work necessarily done in repairing such machines.

In addition to requesting the trial court to direct a verdict in its favor on the ground of assumed risk as above stated, the plaintiff in error in its blended motion for judgment or a new trial alleged as one of the grounds of error the denial by the trial court on this trial, its request for a directed verdict as shown by assignment of error number 7 in the Supreme Court of Minnesota, that:

"The court erred in denying defendant's motion made at the close of all the testimony to direct a verdict in its favor for the reason set forth in its assignment of error number 4."

The Supreme Court of the State of Minnesota we take it, while not specifically mentioning this assignment of error nevertheless denied it by its action in affirming the result in the trial court, thereby at least impliedly holding that the assignment of error was not well taken.

As we understand it this court has decided that the Federal Statute does not change the common law doctrine in

regard to assumption of risk, except in cases coming within the Federal Statutes enacted for the safety of employes; hence the employe assumes the risks ordinarily incident to his employment, including defects in appliances, even if due to the negligence of the master, when the servant knows of the defect or when it is open or obvious.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492.

Glenn v. Cin. N. O. & T. P. R. Co., 163 S. W. 461.

Ft. Worth & B. B. R. Copeland, 164 S. W. 857.

Central Vt. Ry. Co. v. Bethune, 206 Fed. 868.

For the reasons stated, we respectfully submit that the motion of the defendant in error should be in all things denied.

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Appendix

THE EVIDENCE GIVEN UPON THE TRIAL OF THIS CAUSE IN ADDITION TO THAT SET FORTH BY DEFENDANT IN ERROR IN HIS MOTION TO DISMISS, AFFIRM OR ADVANCE.

We quote from the testimony of witness Larson further as follows:

"We raised up the front of the locomotive further to take that timber out that was across the pony truck; after we got that out the boiler didn't go into position that it ought to occupy, and we were engaged in the work of trying to get that to go into place. I knew that the difficulty was because of the male casting under the front of the boiler would slip so that it would not enter into the casting below, and I knew that the work that was being done was for the purpose of trying to crowd the boiler over toward the side that my jack was on so that those two castings would come together properly. The front of the locomotive was raised upon these two jacks after the timber had been taken out from over the pony trucks. Now, if one of those jacks was let down then the front of the locomotive would rest on this casting here, on whatever the end of that was on below, and on this jack over here; those two would be the points of bearing that would hold that up, the boiler; this point here, resting on the side of the casting below, and this point out here, the end of the beam, where my jack was.

. . .

If the boiler was resting on that casting and on this jack over here, and that casting slid into the hole there, so that it settled down into place, it couldn't do that without bringing this end of the beam down. What I mean by the boiler coming down is that after Conn had told us to take these jacks to the rear—Winters had already let his jack down while I was

standing there beside him, so that his jack wasn't supporting this end, the right hand end of this beam, and before I got over there and before I touched my jack at all, this male casting settled into this casting below; that is what I mean by the engine settling down, and when it did that, why, this corner dropped down, that is, the corner where Winters' jack was.

* * * As soon as Mr. Conn gave that direction I left my position here beside Mr. Winters and started around to the other side of the engine; when I got over there my jack was right up tight under the frame, just as I left it; to my mind it had not gone down at all, it was still standing right up under that beam, and the end of the beam was resting on it, and before I touched it in any way with the jack, standing there just as I left it tight up to the end of the beam, the boiler settled into place and caught Mr. Winters' hand on top of the jack."

Also further from the testimony of witness Lang, whose direct testimony will be found in plaintiff's motion beginning at page 58. It will be noted in that testimony that this witness claimed at first that he was sitting on a plank across the pit next to the engine upon which Winters was working, in full view of the jack operated by Larson, and that he saw the same go down. If it be material upon this motion we invite the court's attention to this further testimony of this witness:

"Q. Don't you know that is the engine you was working on the day you have been talking about? (Showing witness picture).

A. That ain't the engine I worked on.

Q. That isn't?

A. No.

Q. Will you say that that engine didn't stand on this second track here the day that Winters got hurt? Will you tell this jury upon oath that that very engine didn't stand on that track on that day?

A. We didn't work on that engine.

* * *

Q. I haven't asked you that, sir. I asked you if you will say upon oath that that engine shown on that picture didn't stand upon that third track on the day that Mr. Winters got hurt?

A. No.

Q. What do you mean by that?

A. I mean we put on the male casting, and them engines ain't got no male castings.

Q. I didn't ask you about that. I asked you if you will tell this jury upon your oath that that engine pictured there didn't stand on that third track shown on that diagram on the day that George Winters got his hand crushed?

A. We didn't work on that engine that day.

Q. No. The fact is you were working on an engine that was jacked up over on track 4 on that day, weren't you? An engine practically the same as the engine that Winters was working on, and between the engine you were working on and the engine Winters was working on stood that big engine shown in that picture; that is the fact, isn't it?

(Pause).

Q. Sir?

A. I know we didn't work on that engine.

* * *

Q. How many drive-wheels are there on that engine shown in that photograph?

A. There is eight—four on each side.

Q. Would you pretend to tell this jury that that engine stood on track 3 there, and that those front drivers were ten feet back from the front of that pit?

A. No.

* * *

Q. So that you couldn't have been sitting on the edge of the pit if that engine stood on track 3, could you? That is true, isn't it?

A. No, I couldn't, unless you left it away back.

Q. Sir?

A. No. That would take more than—them big engines take more than the pit.

Q. Why, certainly, with that engine standing over there and those drive-wheels over that pit, you couldn't sit on the pit at all, could you?

A. No.

* * *

Q. Do you mean to tell this jury now that if this engine shown in this photograph, defendant's Exhibit 3, was standing on track 3, that you, while sitting there, saw the jack under the front end of the engine that Winters was working on?

A. Yes.

Q. You did?

A. I seen the jack.

Q. You mean to tell this jury that you could look through that engine that is shown there and see that jack?

A. Well, I looked through there, sure, I did.

Q. Well, just point out where you looked through? Tell them how you looked through there and what part of it you looked through?

A. There was a part I looked through, but I couldn't say just where; between the spokes you can see through sometimes.

Q. What part of it did you look through and look over to this other engine?

A. Oh, I couldn't say that any more, what part I looked through.

Q. Did you look through the spokes of the driving wheels or in front of the driving wheels or behind the driving wheels, or where did you look?

A. I couldn't say that, Mr.—I couldn't swear to that, where I looked through.

Q. You couldn't swear to that?

A. I know it was through those openings. Of course, I had to look close to look through.

Q. You want to tell this jury then, that if this locomotive shown in defendant's Exhibit 3 was standing on track 3 and you were working on an engine on track 4 you could look through this locomotive shown on defendant's Exhibit 3 and see the front of the engine that Winters was working on?

A. I couldn't see the whole front of his engine.

Q. But you do want to tell them that you could sit over there with your feet hanging down in the pit, on track 4, and look through this engine on track 3, and see the front of the Winter engine on track 2; do you want to tell this jury that? Do you?

A. Well, I seen the jack.

Q. You saw the jack?

A. I seen the jack.

Q. Yes, I don't doubt that.

A. I seen the corner, the left corner, where the jack was.

Q. Yes, but did you see it when you were sitting over in the pit on the fourth track looking through the locomotive shown on defendant's Exhibit 3? That is what I want to know. Is that when you saw it?

A. When I was sitting on the—

Q. Yes, sir; or did you see it after you came around in front of this engine and got near the Winters' engine? Was then when you saw it?

A. Well, I didn't say that I looked at the jack, if it was up or down, until I went up to it. When I heard it fall I went over to the engine.

Q. Oh, then you didn't see the jack until you came around where the engine was?

A. Well, yes; I didn't pay no attention to the jack.

Q. You were concerned in knowing what was the matter with Winters, weren't you?

A. After it fell.

Q. You weren't taking a close survey of the surroundings there, you were looking at young Winters who was caught there?

A. I seen the jack first, and when I went up to it the jack was down, and I heard him squeaking, and I run up to the edge and looked over and I seen he was fast.

Q. And you claim the jack was down?

A. Yes.

* * *

Q. I say that if that top of that hydraulic jack, as Mr. Winters testified, was four and a half inches below the lower surface of that pilot beam, and that engine slipped into place and came down two inches, it couldn't have crushed his hand, could it?

A. Not if he had it down that low.

Q. No, sir. And the only way it could have been done is to have held this other end two inches above the casting, and that would have thrown it down four inches, and that would have caught his hand; that is true, isn't it?

A. Well, that part of it is true.

Q. Yes, that part of it is true, there is no doubt about it. You said what you meant by the engine falling was that the casting lying there on the floor entered into its proper place in this casting here?

A. Yes.

Q. That is what you mean when you tell the jury that the engine dropped?

A. Yes.

Q. You mean that casting there went into the proper place in this casting shown on this photograph?

A. Well, it couldn't have dropped anywhere else, yes."

And this further testimony of the witness Charles Winters, father of the defendant in error:

"Q. You know that engine 159 in its front truck had a female casting such as that shown by the photograph, do you?

A. Yes, sir.

Q. Do you know the size of that casting?

A. No, sir, not exactly.

Q. Do you know the weight of that casting?

A. No, sir.

Q. Do you know the thickness of that casting?

A. No, sir.

Q. Do you know that that casting that is lying on the floor there is the male casting that goes into this casting on this photograph?

A. That is the same as goes in there.

Q. Do you know the weight of that locomotive 159?

A. No, I used to, but I forgot. I don't remember all those weights of engines and castings, I never tried to remember that.

Q. And you have forgotten that, have you?

A. Yes, sir.

Q. You don't remember that now?

A. I don't remember the weights, no, sir; there is too many weights on an engine to remember.

Q. Now, if that casting there was in place on the front of that locomotive and this truck stood under that casting, and that front of that engine was rest-

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ing with the right side of that casting there on this rim of this lever casting, and there was a jack sitting out here on the left-hand side under the end of the pilot beam, the front of that engine would have two points of bearing, wouldn't it, one between those two castings, and one on that jack?

A. Yes, sir.

Q. And if in that position this jack out here went down, that end of the pilot beam, the left end of the beam, would go down instead of the right end of the beam, wouldn't it?

A. How is that now? Give me that again.

Q. All right, sir. Suppose that that casting right there was in its place in front of that engine, and the edge of that casting was resting on top of that edge of that female casting, that would put it so many inches to the right of the center of that boiler, wouldn't it?

A. Yes, sir.

Q. That would put the greater weight on the left-hand side, wouldn't it? Every inch you move from there over to the right would put the weight of the boiler over on the other side, wouldn't it? That is, the bearing would be here instead of in the center?

A. Yes.

Q. And if this jack out here went down, this jack out to the left side of the engine, that end of the pilot beam would go down instead of the right pilot beam, wouldn't it?

A. Well, they would both go down.

Q. If that casting remained on that edge there, how could that come down anywhere?

A. Force the truck down.

Q. Force the truck down?

A. Yes.

Q. How much could the truck be forced down?

A. Could be forced down four inches.

Q. Could be forced down four inches?

A. Yes, sir. It is on springs under here, and it has four inches to go up and down.

Q. It has four inches to go up and down?

A. Yes, sir.

Q. Then when the engine is in its place you mean those springs are taut down four inches?

A. They go down four inches.

Q. They are down four inches, are they, when the engine is in its place there?

A. No.

Q. No. You know that these springs are put in there simply to meet an extraordinary weight, don't you, or movement of the engine, or any jar of the engine?

A. They carry the entire weight of the front end of the engine.

Q. And if those castings stood in the place that I have indicated there, and that slipped into place, the minute it slipped, those trucks would spring up to meet the engine? If it slipped into place, the minute those two castings sprung into place there, the spring of that truck would come up?

A. No, sir, the weight of the engine is supposed to compress the spring down two inches; that gives two inches on the bottom and top.

Q. You know they make an allowance there of not over one inch for the operation of those springs in engine 159?

A. No, sir. They are supposed to be divided so as to go up and down; either up so far or down so far. That is what they figure on.

Q. That is what they figure on?

A. Yes, sir.

Q. They have got figures showing that, have they?

A. I figure that way.

Q. You know, don't you, that the builders of these engines have accurately tested those things and have figures of that?

A. I don't know.

Q. And don't you know that the allowance you speak of is one inch?

A. Well, sir, we always allow two inches. We allow them to go to the center, so as to have as much to go down as it goes up.

Q. And you claim now, do you, that if that engine was standing on there and these castings slipped into place, that it would go down four inches?

A. If it dropped the whole heft of that engine on it, it would go down and come up again.

Q. Would go down four inches?

A. Yes.

Q. And then when it got down there it would stay down?

A. No, sir; it would come up again.

Q. So that it would be necessary to take that jack down in order to take the hand out that was crushed on top of that hydraulic jack?

A. How's that?

Q. I say it would go down and it would make those springs go four inches, so that they would have to get that jack down in order to get that hand loose off from that jack?

A. Well, if the jack was clear down, it would, yes.

Q. What do you mean by that?

A. I say if the jack went clear down.

Q. You heard the testimony that the top of that jack was four and a half inches below the top of that pilot beam when this happened?

A. Yes, sir.

Q. Now, you want to tell this jury if that slipped down into place that would slip four inches, so that they would have to get that jack down lower—

A. It wouldn't have to force the truck down four inches to do it. Dropping into that center there is two inches; it would only have to go down two inches.

Q. You say it would go down two inches and hold it right down there, so that you would have to let the jack down farther?

A. Yes, sir.

Q. You didn't testify in that way when you testified on this trial before, did you?

Mr. Barton: You didn't ask him those questions?

A. I wasn't asked that way, I guess.

Q. You were asked that question before, to explain about these castings in the center here.

Mr. Barton: No, I dispute the question. He never was asked that question before. This is the first time. Look at the record and find out.

Q. Didn't you testify before that if those two castings were in the position I have stated and remained in that position, and this jack on the right hand side went down, that that end of the pilot beam would be the one to go down?

A. No, sir; that wasn't the question. You asked me if that would slip in there and this jack didn't go down, if this right-hand side would go down.

Q. No, I didn't ask you anything of the kind.

A. Well, you know better than I do. I suppose you have got a better memory than I have.

Q. Suppose that casting were in the position that I have indicated, with the right edge of that male casting resting on the right rim of the female casting, and remained there, and this jack on the right side went down, that end of the pilot beam would go down?

A. Yes, sir; they would both go down.

Q. Why would they both go down?

A. If it slipped in there?

Q. No, I didn't say anything about it slipping in there, I say if it remained right there, those two castings together.

A. Yes, sir; if they remained there.

Q. Then this left hand end would go down?

A. Yes, sir.

Q. And the right-hand end wouldn't go down at all?

A. It would go down whatever heft was on that jack, press that truck down.

Q. With the chief weight resting on this contact between these two castings?

A. What weight?

Q. All the weight except the end out here on this pilot beam.

A. How much is there out there?

Q. How much is there?

A. I don't know. I didn't jack her up.

Q. Which would be the greater weight with the bearing on these two castings, with the jack out here so that the engine stood up here level?

A. It is according to how high you had her jacked up with that.

Q. So that the pilot beam was level.

A. You mean to say you set the engine out here and just set the jack under?

Q. I say with the two castings, the edges together, as I have indicated there, and the jack out under that

end, and the pilot beam level, the pack then would be two inches higher than the bottom of this hole in this lower casting?

A. Yes, sure.

Q. Of course, if that jack went down under those circumstances, that end of the pilot beam would go down, wouldn't it?

A. They would both go down.

Q. Both go down?

A. Yes. How would you hold them up?

Q. Why, "hold them up"—the front of the boiler, part of its weight is resting on here at the time.

A. Yes, well, if you throw the rest of the weight on, the truck will go down, down on the springs; they would both go down.

Q. Go down on the springs?

A. Yes, sir.

Q. And wherever it goes down, it will stay right down there, will it?

A. Yes, sir.

Q. Go down four inches and stay there?

A. If it is heavy enough to force it down there, it would, yes.

Q. I am not asking about that; I am asking that engine as it was there?

A. The only way I can answer you is to find out what you mean here. If you had that engine jacked up clear to that center casting—

Q. I am not asking you about its being clear of that center casting; I am asking you the upper casting resting upon the edge of the lower casting there on the right-hand side?

A. Yes, sir.

Q. And slipped in here?

A. No, sir; the jack went down on that side. The jack wouldn't be holding nothing, there wouldn't anything do down. You would have to tell me how much heft you had on the jack and how much on the truck, I could tell you how it would go.

Q. If they were standing on those castings as I indicate; assuming this is the pilot beam, one corner over there, and that jack goes down, then there wouldn't be any effect, would there?

Mr. Barton: Now, counsel is asking questions perhaps he thoroughly understands himself. If I do understand it, it is a physical impossibility for the witness to give any intelligent answer to it. He says if you have got the engine resting in the center and you have got it resting on one side, and you remove the one is it going down in the center? Now, that all depends upon how much weight you got there and the resisting power of the springs. It is with reference to testing the witness about this spring proposition. The witness has told him a time or two he would have to know how much weight there is on the center, it may be touching and not have ten pounds of weight, and it may have ten thousand pounds of weight on it, and how could the witness give any intelligent answer to it?

The Court: Oh, go on. We have had this right along. He says he knows what that engine 159 is.

Q. Now, let us see if we can get at that: Assume that that upper casting in its proper place is resting with its right edge on this upper edge of this female casting—

Mr. Barton: Well, how many pounds of weight are you going to put on that?

Q. —and there is a jack sitting on that end of the pilot beam so that the weight is level; distribute that weight according to your own notion; and that jack goes down, there wouldn't be any effect at all, would there?

A. No, sir.

Q. It might slip into its place, if anything; wouldn't that be true?

A. The casting would go down. The truck would go down, and the engine would go down whatever weight was on that jack. If it was equally divided it is supposed to go down one inch then, because this would be compressed down one inch with the half of the heft of the engine, and if the jack was carrying the other half, and let it down there, it would let it go down another inch.

Q. Then if it was setting in that way, with the edge of the upper casting setting on the rim of the lower casting, and it was depressed one inch, and the

pilot beam was level, and that jack over there went down, the front of the engine would sag down because of those springs just one inch more?

A. If you let it down easy it would.

Q. Well, it wouldn't go down any way but easy?

A. Well, if you let it down, no, but if an engine fall down, why, it would go down.

Q. Where is it going to fall with those two castings in contact there?

A. This jack drops down and lets it go down with a rush.

Q. Where does it rush to? Those two castings are right resting on each other. What do you mean by saying it would fall?

A. Why, if that jack should drop down on to it, it would let the engine come down suddenly on to it.

Q. But half is resting on those castings?

A. Yes, sir; and the other half would come down and force it down.

Q. An inch?

A. Yes, sir.

Q. So that if that happened, why, it would go down an inch below where it was?

A. Yes, if the half of the heft of the engine was setting on the truck."

**MOTION
TO
DISMISS
OR
AFFIRM**

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SUPREME COURT OF THE UNITED STATES.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,
Plaintiff in Error,

VS.

GEORGE H. WINTERS,
Defendant in Error.

MOTION FOR AN ORDER TO DISMISS OR AFFIRM THIS CAUSE.
IF SAME IS DENIED, THEN THAT CAUSE BE ADVANCED
TO SUMMARY DOCKET.

Into Court now comes George H. Winters, defendant in error in the above entitled cause and moves this Court to dismiss the writ of error issued upon petition of the said Minneapolis & St. Louis Railroad Company, the above plaintiff in error to the Supreme Court of the State of Minnesota upon a final judgment entered in said Supreme Court of Minnesota in favor of the defendant in error and against said plaintiff in error; and in default of dismissing said writ of error, that then in that event this Court affirm the said judgment of the said Supreme Court of Minnesota; and for cause and ground for this motion to dismiss or affirm, says:

1. This Honorable Court is without jurisdiction to review on writ of error the said judgment of the Supreme Court of the State of Minnesota for the reason that no Federal question is involved in the same.

II. In the event that this Honorable Court should refuse to grant the foregoing motion to dismiss said writ of error and should maintain jurisdiction upon the same, then mover prays that said judgment of said Supreme Court of Minnesota be affirmed, as it is manifest that said writ of error was taken by plaintiff in error for delay only and that the questions upon which decision of said cause depends are so frivolous as not to need further argument.

III. In the event that this Honorable Court should refuse to grant the foregoing motion to dismiss or affirm, then mover prays that this cause be transferred for hearing to the summary docket.

IV. Mover avers that notice of intention to present this motion was given to, and a copy of the brief filed in support of same was served upon appellants and that proof thereof accompanies this motion.

WHEREFORE, mover prays that the said writ of error taken by The Minneapolis & St. Louis Railroad Company, be dismissed and in the alternative, that the judgment of the Supreme Court of the State of Minnesota be affirmed, and in the event of the denial of said motion, that this cause be transferred for hearing to the summary docket.

And mover shall ever pray.

HUMPHREY BARTON,

JOHN H. KAY,

Attorneys for George H. Winters,
Defendant in Error,

St. Paul. Minn.

SUPREME COURT OF THE UNITED STATES.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,
Plaintiff in Error,

vs.

GEORGE H. WINTERS,
Defendant in Error.

NOTICE OF MOTION.

PLEASE TO TAKE NOTICE, that the foregoing and attached Motion will be presented to the said Honorable Supreme Court of the United States at Washington, D. C., on Monday, the 17th day of April, A. D. 1916.

HUMPHREY BARTON,

JOHN H. KAY,

Attorneys for Defendant in Error,
St. Paul, Minnesota.

To W. H. Bremner, Esq., and F. M. Miner, Esq., Attorneys
for above named plaintiff in error, Minneapolis, Minnesota.

Due personal service is hereby admitted at Minneapolis, Minnesota, on this day of March, A. D. 1916, of the foregoing Notice of Motion and of the said Motion and Brief thereto attached, together with appendix.

Attorneys for Plaintiff in Error,
Minneapolis, Minnesota.

SUPREME COURT OF THE UNITED STATES.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,
Plaintiff in Error,

VS.

GEORGE H. WINTERS,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

This, a personal injury case, has been tried twice in the State Court before a jury and has been passed upon twice by the Supreme Court of Minnesota.

Upon each trial, a verdict was rendered for the plaintiff, now defendant in error, and after the denial of a motion for a new trial, defendant, now plaintiff in error, each time appealed. Upon the first appeal to the Supreme Court of Minnesota, a new trial was granted upon the ground that the evidence did not show any actionable negligence on the part of the defendant, in that it failed to show proximate cause of injury. Upon the second appeal, the Supreme Court affirmed the verdict and the judgment entered upon the same, and a final judgment having been entered in said Supreme Court of Minnesota, the plaintiff in error sued out the writ of error which has brought the record to this Court.

Outside of the possible question as to whether the verdict was supported by the evidence,—under which heading we include the question of assumption of risk, as well as the question of defendant's negligence,—there are but two other possible questions that can be reviewed by this Court, upon the writ of error to the Supreme Court of Minnesota, and they are: first, as to whether the record shows that plaintiff was engaged in interstate commerce when injured; and second, as to whether the trial court committed prejudicial error in charging the jury, in accordance with the laws of Minnesota, that after twelve hours' deliberation, ten of their number might render a verdict.

The foregoing statement as to what questions may possibly be involved upon the said writ of error is made upon the plaintiff in error's assignment of errors filed with the writ of error directed to the Supreme Court of Minnesota and the assignment of errors made by plaintiff in error upon its last appeal to the said Supreme Court of Minnesota, upon which its decision was made and upon which decision the final judgment, now complained of, was entered.

The said two assignments of error are hereto attached as part of the appendix hereto.

FACTS.

In addition to records in the case, we attach hereto, as an appendix, a sufficient portion of the evidence received upon the trial of the case, to enable the Court to determine whether there is any merit in any of the said questions so raised by the plaintiff in error.

The following facts are shown without dispute by the evidence so appearing in the appendix and the admissions

of the parties in their respective pleadings, which are also made part of the appendix, and the stipulation of the parties made upon the trial, which is also printed in the appendix.

Plaintiff was working in the capacity of a machinist's helper in the roundhouse of defendant at Marshalltown, Iowa, on the day on which he was hurt, being October 21, 1912. He and Elmer Larson, also an employee of defendant, and working as a machinist's helper, were assisting a machinist by name of Conn, to take off the old tire and put new tire on a locomotive engine. That at the immediate time of the accident, the engine, which had been raised for the purpose of enabling said work to be done, was being lowered, the work of putting the new tire on having been completed. In said lowering operation two hydraulic jacks were being used, one of which was being handled by plaintiff and the other by said Larson. According to the construction of said jacks, they were operated by the use of a lever inserted into a socket on the side of the main body of the jack, and the lever was worked up and down, and to either raise or lower it, the power exerted upon the lever was in downward motion, working through a portion of a circle. When the lever was raised high and pressure downward was exerted upon it by the operator, the head of the jack would be raised until the lever went through a portion of its greatest motion, when, if it was not stopped, it would open a valve on the inside of the jack which would immediately permit the head of the jack to go down, and to avoid that result, there was a specially prepared lever for use in the operation of said jacks; said lever had a lug on the one side and when the jack was being raised, the lever was inserted in the socket of the jack

with the lug side down and the lug would then come against a projection on the side of the jack, and stop the downward motion of the lever before it reached the tripping point. To lower the jack, said lever had to be taken out and turned over so the lug would be on the top side in which position the lever would go down to where it would trip the jack.

The plaintiff used said specially prepared lever in his jack, and the said Larson did not; Larson used what was known as an open-end wrench, and no difference which way it was put in the socket of the jack, it would go down to the tripping point in the jack. Plaintiff was using his jack under one side of the front of the engine, and Larson was using his jack under the other side of the front of the engine. Under the direction of machinist Conn, who was in charge of the work, the said helpers had raised, lowered and raised the jacks, but the engine did not go into its proper position, when plaintiff, by direction of said machinist raised and lowered his jack several more times, the Larson jack remaining still; at the end of said operation, plaintiff's jack was loose under the engine, there being no pressure upon it, but the other side of the engine was resting upon the Larson jack. Larson, when last using the lever in his jack, left it in the socket of the jack. At this stage of the operation, and with said jacks in said condition and position, machinist Conn directed plaintiff and Larson to take their jacks to the rear of the engine and plaintiff immediately started to obey said order; there was a wooden block on top of his jack and he went to remove it with his hand when the engine dropped and caught and very severely injured his hand. Larson had not yet touched his jack. Plaintiff did not know that Lar-

son was using an improper lever in his jack; Machinist Conn did so know, as he had helped Larson operate the jack. The foregoing facts appear from the testimony given by plaintiff and said Larson, and the same was not contradicted by any witness. Machinist Conn was not called as a witness.

Plaintiff claims his injury was due to the use of said improper lever in the Larson jack, and the leaving of said lever in said jack by Larson when he last used it. That the effect of leaving the said improper lever in the said jack was to permit it to settle down of its own weight to the tripping point of the jack, and that it did so do and tripped the jack and caused the engine to fall on plaintiff's hand. Plaintiff, by expert evidence, showed that the said improper lever would so settle down and trip the jack of its own accord. By two witnesses upon the last trial, plaintiff showed that said Larson jack did go down when plaintiff was injured; the said evidence so given by said two witnesses, met and answered the point upon which the Supreme Court of Minnesota granted a new trial; said Supreme Court having held that there was no proof that the Larson jack actually did go down. Said new witnesses were Joseph Lang and Frank Martin and the material part of their testimony will be found in the appendix.

There was a stipulation made by the parties upon the trial as to the use that had been made of said locomotive before and after the accident as follows:

"It is stipulated and agreed between the parties in this case as follows: The locomotive in question had been used in the hauling of freight trains over defendant's line of road referred to in the pleadings, which freight trains hauled both intrastate and interstate commerce, and that it was so used after the plaintiff's

injury, and that the last time the engine was used was on the 18th day of October when it came into Marshalltown so pulling a freight train; that the first time it was used after plaintiff's injury was on the 21st day of October, when it pulled such a freight train out of Marshalltown."

WAS PLAINTIFF EMPLOYED IN INTERSTATE COMMERCE WHEN INJURED?

Plaintiff's complaint charged that both he and defendant were engaged in interstate commerce when he was injured, and defendant, by its answer, admitted that it was engaged in interstate commerce, and admitted that plaintiff was in its employ and was working as a machinist's helper, but denied that he was employed in interstate commerce.

Upon the foregoing facts, and admissions of the parties, the Supreme Court of Minnesota held upon the first appeal to it, that plaintiff was employed in interstate commerce when injured, but granted a new trial for the sole reason that it did not appear that the said Larson jack did actually go down at the time plaintiff was injured.

The pleadings, stipulation and evidence relative to interstate commerce were the same upon the second trial as upon the first.

On the last appeal to the Supreme Court of Minnesota, the question as to whether plaintiff was engaged in interstate commerce or not was not raised, as will appear by the assignment of errors printed in the appendix hereto, and nothing was said by the Supreme Court of Minnesota upon said question in its decision upon said last appeal, as appears by said decision, which is also a part of the appendix hereto.

We, therefore, claim that inasmuch as the judgment which this Court is asked to review was entered upon said last decision of the Supreme Court of Minnesota and said decision did not refer to the question of interstate commerce, and said Court was not asked by any assignment of error to consider it, that, therefore, said question is not before and cannot be considered by this Court. Not having assigned as error said question on the last appeal, it should be assumed that defendant, now plaintiff in error, acquiesced in or was willing to abide by the previous ruling of the Court thereon, and is therefore now barred from complaining thereof.

But, if we are wrong in the foregoing, then we claim that there is no merit in plaintiff in error's contention as to said question; that the repairing of an engine, used in interstate commerce, is so clearly work in interstate commerce, as to not be open to argument, and that this court has already passed upon facts so nearly like the case at bars, as to preclude it being an open question?

We cite the following cases:

Walsh v. New York, N. H. & H. R. Co., 223 U. S. 1,
32 S. C. 169.

Pedersen v. Delaware L. & W. R. Co., 229 U. S. 146,
33 S. C. 648.

TRIAL JUDGE'S CHARGE TO JURY AS TO FIVE-SIXTH VERDICT
JURY LAW OF MINNESOTA.

The second possible Federal question involved is that of the charge of the trial Court to the jury that after twelve hours' deliberation, ten of their number might render a

verdict. There are a number of answers to the claim of the plaintiff in error on this question.

The verdict of the jury was in fact unanimous, being concurred in by the twelve men; hence there was no prejudice from the charge.

The above statement is a conclusion drawn from that portion of the Court's charge complained of and the verdict as actually rendered. The charge complained of instructed the jury that if the verdict was not unanimous, then those agreeing thereto should each sign the verdict, if unanimous, their foreman would sign it; and it appears that the verdict was signed by the foreman of the jury only; hence the conclusion that the verdict was unanimous. The verdict is a part of the appendix hereto.

Nothing was said by the Supreme Court of Minnesota upon said question in its decision upon which final judgment was entered. Upon the second and last trial of the case, no objection was made to the trial Court's charging the jury that ten of them might render a verdict, and no request to charge was made upon that subject, and no exception to the charge was taken when given. (The trial Court's charge to the jury is a part of the appendix hereto attached.) Plaintiff in error made no objection at any time to the case being tried in the state Court, and in the manner provided by the Laws of Minnesota.

In a motion for a new trial, made several weeks after the trial was completed, that portion of the charge permitting less than twelve jurors to render a verdict was assigned as error, and was assigned as error in the Supreme Court, but as noted, it is not mentioned in the said last decision of the Supreme Court; it would seem, therefore, that it is not an open question in this Court.

The error so assigned by plaintiff in error after the last trial of said case, in its motion for a new trial, is as follows:

"That the court erred in instructing the jury in the following particular, to-wit:

'Under the practice law of this state, the jury, when their verdict is unanimous, will bring in a verdict signed by your foreman. If, however, after being twelve hours in consultation after you go out with this case, you are unable to make an unanimous verdict, then any ten or eleven of your number may determine what the verdict should be, and those ten or eleven will each sign his individual name to that verdict.' "

In the Supreme Court of Minnesota, upon said last appeal, plaintiff in error added to said assignment of error so stated in its motion for a new trial the following:

"That such instruction was erroneous because this action was founded upon the Federal Employers' Liability Act and deprived appellant of rights guaranteed to it by the Constitution and laws of the United States."

We submit that said assignment of error so made was not the setting up of or claiming any right, privilege or immunity under the Federal Constitution or any Federal Law, and that, therefore, the State Court's refusal to grant a new trial or order judgment for plaintiff in error, because of said portion of the Court's charge, was not the denial of any right, privilege or immunity, and hence cannot be reviewed by this Court.

But, if we are wrong on all of the foregoing, then we claim that the matter of rendering a verdict is purely one of procedure and governed by the local law.

Upon the first appeal to the Supreme Court of Minnesota, said Court disposed of said question as follows:

"The court instructed the jury that they might return a five-sixths verdict as provided by Laws 1913, p. 54, c. 63. The defendant claims that this was error; that the cause of action came from an act of congress; and that it was entitled to a jury such as is contemplated by the Federal Constitution. The state court had jurisdiction. The law of the forum as to what constitutes a lawful jury applies. The character of the cause of action does not determine it. The five-sixths jury law is authorized by the state Constitution and is not prohibited to the state by the Federal Constitution. It is not meant that a Federal Court sitting in this state would apply our five-sixths jury law. That question is not here. The instruction of the court was correct."

The suit is based upon the Federal Employers' Liability Statute approved April 22, 1908, Chap. 149, 35 Stat. 66, and as amended by Act of Congress, approved April 5, 1910, Chap. 143, Sec. 1, 36 Stat. 291, the state courts were given concurrent jurisdiction with the Federal courts of actions arising under said law. The jurisdiction so conferred upon the state courts, in no manner affected the question of procedure in the state courts; in other words, the state courts were to handle an action arising under said Federal Law in the same manner they would handle a cause of action arising under a state statute.

The process by which the state court would acquire jurisdiction of such an action, the manner of serving the same, and the framing of issues between the parties by pleadings are governed solely by the state laws, and rules of practice. The same is also true as to the actual trial of the case. The state procedure governs as to which side shall open and close the case; as to the number of peremptory challenges each side has of jurors; as to the manner of trying challenges; as to the manner of making chal-

lenges and as to the manner of impanelling juries; the territory from which they shall be selected; the number of names that shall be placed in the jury box to draw from; the pay of the jurors for services are each and all matters of procedure governed by the state law and practice.

Whether the verdict of the jury shall be unanimous, or by a majority, or some other number, is not a different matter from the things we have above mentioned; it is only a part of the procedure by which the end of a trial is reached, and when so reached, it is a jury trial and the plaintiff in error was not deprived of a jury trial by such procedure.

The Constitution of Minnesota provides for the rendering of verdicts by juries where they are not unanimous and the Legislature of the state made said constitutional provisions effective by the enactment of what is known as the five-sixths jury law. Said constitutional provision and legislative enactment are printed as part of the appendix hereto.

We cite and quote from the decision of this court:

Pritchard v. Norton, 106 U. S. Rep. 124.

"The principle is, that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract."

Glenn v. Sumner, 132 U. S. 156, 10 S. C. Rep. 41.

"The sufficiency and scope of pleadings, *and the form and effect of verdicts, in actions at law*, are matters in which the circuit courts of the United States are gov-

erned by the practice of the courts of the state in which they are held."

Central Vermont Ry. Co. v. White, 238 U. S. 507,
35 S. C. Rep. 865.

"There can, of course, be no doubt of the general principle that matters respecting the remedy, such as the form of the action, sufficiency of the pleadings, rules of evidence and the statutes of limitation, depend upon the law of the place where the suit is brought."

In the White case the form of the verdict was complained of, a verdict in a gross sum having been rendered in a death case, with no apportionment thereof among the beneficiaries entitled thereto, and as we understand the decision, it was held by this court that inasmuch as there was not in the case anyone who was not a proper beneficiary, that the form of the verdict was a matter for the state courts solely.

We submit that there is no merit in plaintiff in error's contention as to said question of the trial judge's charge to the jury that it might render a verdict by less than twelve affirmative votes.

VERDICT SUPPORTED BY THE EVIDENCE.

In stating the questions involved, we said that one of the possible questions was as to whether the verdict was supported by the evidence, and that this included the question of assumption of risk, as well as the question of the defendant's negligence, and we now refer to the same specifically.

We have recited the facts disclosed by the evidence; among other things, that an improper lever was used in and left in the jack upon which the engine was resting when plaintiff was injured, and that said lever in said jack would

cause it to be tripped and go down, and that the jack did, in fact, go down when plaintiff was injured with said improper lever in it.

Surely there can be no merit in any claim or argument that said facts did not make a case for a jury as to the negligence of the defendant in using an improper lever in said jack and permitting it to remain in said jack, and as to the same being the proximate cause of plaintiff's injury.

ASSUMPTION OF RISK.

Likewise, there is no merit in the claim that, as a matter of law, plaintiff assumed the risk incident to complying with the order of his superior to remove the jack. As noted, plaintiff did not know that the improper lever was being used, much less, that it had been left in the jack; therefore, he could not be charged with assumption of risk or contributory negligence for attempting to comply with said direction of his superior to remove said jack.

Central Vermont Ry. Co. v. White, 228 U. S. 507, 35 S. C. Rep. 865.

"Complaint is made because the court failed to instruct the jury as to the law respecting the assumption of risks. But there was not only no request to charge on that subject, but there is no evidence that White knew of the negligence of the agent in giving a 'clearance card' or of the leaking cylinder which obscured the vision of the engineer. *He did not assume the risk arising from unknown defects in engines, machinery, or appliances, while the statute abolishes the fellow-servant rule.* 35 Stat. at L. 65, chap. 149, §2, Comp. Stat. 1913, § 8658."

Plaintiff in error did not request the trial Court to charge the jury as to assumption of risk in any manner

whatsoever, and made no requests upon any other subject. It was not sufficient for it to, for the first time, assign error thereon in a motion for a new trial.

Illinois Centrl Ry. Co. v. Fulton M. Skaggs, 36 S. C. Rep. 249, Case No. 194, decided Jan. 31, 1916.

The question of assumption of risk was submitted to the jury and no exception was taken to the Court's charge thereon.

Assumption of risk was a question of fact for the jury and not one of law for the Court.

CONTRIBUTORY NEGLIGENCE.

We have not mentioned contributory negligence as a possible question for consideration of the Court, for the reason that inasmuch as the action is based upon the Federal Employers' Liability Statute, contributory negligence can only be used or considered in the matter of the amount of damages plaintiff might recover. The trial Court did charge the jury that it should so consider contributory negligence, and no exception was taken to that portion of the Court's charge, and the question as to whether that part of the charge was right or wrong, was not, in any manner presented to nor considered by the Supreme Court of Minnesota, and hence not a question for this Court's consideration.

There were questions concerning the trial Court's rulings on the introduction of evidence considered by the Supreme Court of Minnesota, but we understand this Court will not consider the same, as under a writ of error to a state Court, such questions cannot be reviewed.

Seaboard Air Line Ry. v. Duvall, 225 U. S. 479, 32 S. C. Rep. 790.

Central Vermont Ry. v. White, 228 U. S. 507, 35 S. C. Rep. 865.

We respectfully submit that the writ of error should be dismissed, and if not that, that the judgment of the state Court be affirmed.

Failing in the foregoing, we ask that the case be advanced to the summary docket.

HUMPHREY BARTON,

JOHN H. KAY,

Attorneys for Defendant in Error,

St. Paul, Minn.

APPENDIX.

We here print the following from the record filed in this case and the decisions of the Supreme Court of Minnesota made in the case and quotations from the Constitution and Laws of Minnesota. We do not print all the evidence, but enough of it to enable the Court to determine the question raised in the motion. Said records, documents and quotations are the following, and appear in the order stated :

1. Assignment of Errors filed with the writ of error to the Supreme Court of Minnesota.

2. Assignment of Errors before the Supreme Court of Minnesota, upon its last decision.

3. Last decision of Supreme Court of Minnesota.

4. First decision of the Supreme Court of Minnesota.

5. Constitutional and statutory provisions of Minnesota relative to verdicts of juries.

6. Stipulation of the parties made upon the trial of the case as to facts relative to the question of interstate commerce.

7. Evidence.

8. Charge of the trial court to the jury.

9. Verdict of jury.

10. Plaintiff's complaint.

11. Defendant's answer.

12. Plaintiff's reply.

IN SUPREME COURT.

GEORGE H. WINTERS,*Respondent,*

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,

Appellant.

ASSIGNMENT OF ERRORS.

Comes now the appellant and files the following assignment of errors upon which it will rely upon its prosecution of its writ of error in the above entitled cause:

1. That the Supreme Court of the State of Minnesota erred in affirming the decision of the District Court of Ramsey county, Minnesota, denying appellant's motion in the alternative for judgment notwithstanding the verdict or to set aside the verdict and grant a new trial, and in holding and decreeing that the respondent, George H. Winters, was entitled to recover from the appellant, The Minneapolis & St. Louis Railroad Company.

2. That the Supreme Court of the State of Minnesota erred in finding, holding and decreeing that the appellant, The Minneapolis & St. Louis Railroad Company was not entitled to judgment in its favor notwithstanding the verdict.

3. That the Supreme Court of the State of Minnesota erred in holding and decreeing that the appellant, The

Minneapolis & St. Louis Railroad Company, was not entitled to a new trial.

4. That the Supreme Court of the State of Minnesota erred in holding and decreeing and reaffirming its former opinion by affirming the judgment rendered in the District Court of the State of Minnesota in favor of said respondent and against the appellant.

5. That the Supreme Court of the State of Minnesota erred in entering final judgment in said court in favor of said respondent and against this appellant.

6. That the Supreme Court of the State of Minnesota erred in holding and decreeing that as a matter of law, upon the stipulation as to the work which the engine involved was doing before and after the repairs were made, the respondent Winters at the time of receiving his injury was performing work connected with, growing out of or relating to interstate commerce and was therefore within the provisions of the act, and that the court erred in refusing to hold that the respondent Winters upon his own testimony as to the knowledge possessed by him as to the probabilities of injury on account of the manner in which he performed the work, did not assume the risk of the injury which he received as a matter of law and in holding and decreeing that the question of such assumption of risk under the evidence was one of fact to be passed upon by the jury, thereby depriving the appellant of a right guaranteed to it under the provisions of the act of April 22, 1908, commonly known as the Employers' Liability Act and amendments thereto as construed by the judgments of this court.

7. That the Supreme Court of Minnesota erred in holding and decreeing that upon the whole proof produced upon the trial, there was sufficient evidence of negligence on the part of the appellant Railroad Company to send to the jury the question of such negligence; that because of an entire want of competent proof of facts from which the negligence of the appellant could be found, the Supreme Court of Minnesota erred in holding and decreeing that the question of appellant's negligence was properly submitted by the trial court to the jury, for the reason that such negligence was wholly insufficient to sustain a finding of fact that the appellant was negligent with respect to the appliances furnished by it for the doing of the work in hand at the time said Winters received injury and by so doing, the court deprived the appellant of a right secured to it by that act of April 22, 1908, commonly known as the Employers' Liability Act and amendments thereto.

8. That the court erred in holding and decreeing that the following instruction objected to by the appellant was a proper statement of the law governing the deliberations of such jury, said instruction being as follows:

"Under the practice law of this state, the jury, when their verdict is unanimous, will bring in a verdict signed by your foreman. If, however, after being twelve hours in consultation after you go out with this case, you are unable to make an unanimous verdict, then any ten or eleven of your number may determine what the verdict should be, and those ten or eleven will each sign his individual name to that verdict."

W. H. BREMNER,
F. M. MINER,
Attorneys for Appellant and
Plaintiff in Error.

ASSIGNMENTS OF ERROR BEFORE SUPREME
COURT OF MINNESOTA ON LAST APPEAL.

1. That the damages are excessive, appearing to have been given under the influence of passion or prejudice.
2. That the verdict is not justified by the evidence and is contrary to law.
3. That the court erred in overruling defendant's objection to the following question:

"Q. Supposing that engine was standing in the roundhouse at Marshalltown, Iowa, the wheels all on, the driving wheels, and the rear of the engine was resting upon four screw jacks placed underneath the iron that runs across the rear of the rear part of the engine, two of the screw jacks being on one side and two on the other, and the front of the engine had been raised up by two hydraulic jacks of the kind this is here in court, one of those hydraulic jacks on either side of it and under the ends of the pilot beam, so that the engine was so resting upon those screw jacks at the rear and the two hydraulic jacks at the front, and that the hydraulic jack on the right side had been lowered so that it was free from the pilot beam, and that a wrench similar to Exhibit B here had been used in this jack on the left-hand side when it was last pumped up, and that wrench had been left in the jack when so last pumped up, would that open-end wrench so left in settle down of its own accord and trip that jack?"

4. That the court erred in denying defendant's motion made at the close of plaintiff's case to dismiss this action upon the grounds therein stated, to wit:

"That upon the whole proof at the close of the plaintiff's testimony, no negligence on the part of the defendant has been shown as the approximate cause of the injury which the plaintiff sustained; and upon the

further ground that it appears incontestably here that the plaintiff assumed the risk of the exact consequence that came from his act. That he admitted he fully appreciated the danger and knew that if the engine came down his hand would be crushed; that he knew that when he put his hand in to shove the block off from the top of the jack, and that he comprehended that the engine, if it came into place, would necessarily catch his hand by the coming down of the pilot beam, and that it would crush it. And upon the further ground that the plaintiff was guilty of contributory negligence and that such negligence and want of care was a contributing and proximate cause of the injury which he received."

5. That the court erred in sustaining plaintiff's objection to the proof offered by defendant, showing tests made with the jack and an open-end wrench upon the engine upon which plaintiff was working at the time he received his injuries, such proof showing that the same jack, in the same position, under the end of the pilot beam of the same engine, that the corner of the engine was raised by the power of the jack, and that the open ended wrench was left in the jack. That the jack was left permanent in that position for more than one hour without going down, and that it required the application of an additional force on the open end of the wrench as it was left in the jack, equalling more than 160 pounds, in order to cause the open end of the wrench to lower sufficiently to trip the jack and cause the same to go down?

6. That the court erred in denying defendant's motion made at the close of all the testimony to direct a verdict in its favor, for the reasons and upon the ground set forth in assignment of error number 4.

7. That the court erred in instructing the jury in the following particular, to-wit:

"Under the practice law of this state, the jury when their verdict is unanimous, will bring in a verdict signed by your foreman. If, however, after being twelve hours in consultation after you go out with this case, you are unable to make an unanimous verdict, then any ten or eleven of your number may determine what the verdict should be, and those ten or eleven will each sign his individual name to that verdict."

That such instruction was erroneous because the action was founded upon the Federal Employers' Liability Act and deprived appellant of rights guaranteed to it by the Constitution and laws of the United States.

STATE OF MINNESOTA, SUPREME COURT.

OCTOBER TERM, 1915.

GEORGE H. WINTERS,*Respondent,*

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,

Appellant.

OPINION.

Action to recover damages sustained by the plaintiff while in the employ of the defendant. A verdict was had for the plaintiff. The defendant appeals from the order denying its alternative motion for judgment or for a new trial.

1. The case was here before and is reported in 126 Minn. 260, 148 N. W. 106. The facts of the case are there stated in detail. It is unnecessary to repeat them. The evidence, with some exceptions, is the same on both appeals; and but one material question, not determined on the former appeal, is before us.

In the former case, on the pivotal question involved on the appeal the court said:

"The evidence is that Larson's jack, at the time of the foreman's direction to him to take it and go to the rear of the locomotive, was in proper position, with the pilot-beam resting upon it. There is no evidence as to the condition of it afterwards. No one saw it go down. There is no evidence as to what became of it. No one knows just how the accident happened.

"Conceding that the defendant was negligent in permitting the use of a wrench in lieu of a lever, we are unable to say that a jury could reasonably find that such negligence accounts for the plaintiff's injury. At the most such a finding is but a conjecture. It was just as likely a mere accident.

"The court was in error in submitting the case to the jury upon the ground stated. The case is not one for judgment notwithstanding the verdict. There should be a new trial."

The case was reversed because of the failure of the evidence to show that the negligent use of a wrench in lieu of a lever caused Larson's jack to go down, thereby causing the injury. So far as the evidence showed the front end of the locomotive might have gone down accidentally. There was no proof that the use of the wrench was the cause of the locomotive end dropping or slipping. On the second trial additional witnesses were produced. They gave evidence from which it might be concluded that the jack went down as a result of the negligent use of the wrench, the locomotive end following it; and that it did not go down from some accidental cause. The evidence now removes the cause of the injury from the realm of mere conjecture to the domain of legitimate inference from evidentiary facts.

2. After the accident the defendant performed experiments with a jack and an open-ended wrench. The results of such experiments were sought to be proved but were excluded by the court. Error is based upon the court's ruling. The experiments were necessarily made under conditions differing from those which obtained at the time of the injury. At most the receiving of this proof was discretionary with the trial court. It was not error to reject the proffered evidence.

Order affirmed.

STATE OF MINNESOTA, SUPREME COURT.

APRIL TERM, 1914.

GEORGE H. WINTERS, BY CAPITOL TRUST COMPANY, His
Guardian, ad litem,

Respondent,

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,

Appellant.

OPINION.

This action was brought to recover damages sustained by the plaintiff while at work for the defendant in its roundhouse at Marshalltown, Iowa. There was a verdict for the plaintiff. The defendant appeals from the order denying its alternative motion for judgment or for a new trial.

1. The plaintiff, a young man of 20, and Elmer Larson, a young man of 18, were engaged at the time of the plaintiff's injury in raising the front end of a locomotive and removing the timber upon which it had rested while the work of putting new tires on the drivers was being done. They were then to lower the locomotive to its proper place on the trucks. The timber was removed without difficulty. They used two hydraulic jacks, one under each end of the pilot-beam, the plaintiff the one at the right and Larson the one at the left. When the timber

was removed the front end of the locomotive was supported by the two jacks. Difficulty was experienced in getting the casting above, which was attached to the locomotive, into the casting below on the engine trucks, into which it fitted when the locomotive was in condition for use. The jacks were raised and lowered several times without any effective result. Most of the maneuvering was done with the plaintiff's jack. Not getting the result desired the foreman, for a purpose not disclosed by the evidence, directed the plaintiff and Larson to take their jacks to the rear end of the locomotive. As the plaintiff started to push the block off preparatory to taking his jack away, the front end of the engine dropped or came down, the casting apparently going into place, and his hand was crushed between the pilot-beam and the jack. The claim is that Larson's jack at the left upon which the end of the locomotive rested went down and caused the locomotive end to drop or slip. It is claimed that the jack went down because a wrench was used as a substitute for a lever. There was expert testimony to the effect that when a wrench was so used it was likely to lower of its own weight to a point where it would cause a valve inside the jack to open and then the head of the jack would go down. The ordinary lever had a lug which came against an obstruction and prevented such a result.

The evidence is that Larson's jack, at the time of the foreman's direction to him to take it and go to the rear of the locomotive, was in proper position, with the pilot-beam resting upon it. There is no evidence as to the condition of it afterwards. No one saw it go down. There is no evidence as to what became of it. No one knows just how the accident happened.

Conceding that the defendant was negligent in permitting the use of a wrench in lieu of a lever we are unable to say that a jury could reasonably find that such negligence accounts for the plaintiff's injury. At the most such a finding is but a conjecture. It was just as likely a mere accident. The Court was in error in submitting the case to the jury upon the ground stated. The case is not one for judgment notwithstanding the verdict. There should be a new trial.

The views just expressed are those of a majority of the Court. A minority are of the opinion that the jury might find, in the exercise of the sound judgment, without indulging in conjecture, that the head of the jack went down, that it went down as a result of the negligent use of the wrench in place of a lever; that such negligent use was the cause of the injury and that the verdict should stand. The views of the writer are in accord with those of the minority.

In view of a new trial we proceed to a consideration of two questions directly presented and necessarily involved on a new trial. On these two questions the Courts are agreed.

2. The claim is made that the plaintiff was not employed in interstate commerce and that the Federal Employer's Liability Act, 35 St. 65, does not apply.

It was stipulated that for several months prior to the injury the locomotive in question was used in hauling freight trains over the defendant's line of road in Iowa and other states, hauling both intrastate freight and interstate freight, that it was so used after plaintiff's injury; that the last time, prior to the injury, when the engine was used was on October 18, 1912, when it came into Marshalltown, pulling a freight train carrying both intrastate and

interstate freight; that the first time it was used after the injury was on October 21, 1912, when it pulled a train carrying such freight out of Marshalltown. The Court instructed the jury that the plaintiff was employed in interstate commerce. This was correct within the federal decisions as we read them: *Pederson v. Delaware, etc. R. Co.*, 229 U. S. 146; *St. Louis, etc., R. Co. v. Seale*, 229 U. S. 156; *Norfolk, etc., R. Co. v. Earnest*, 229 U. S. 114; *Second Employers' Liability Cases*, 223 U. S. 1, 5; *Law v. Illinois, etc., R. Co.*, 208 Fed. 311; *Central R. Co. v. Calasurdo*, 192 Fed. 901; *Northern Pacific R. Co. v. Maerkl*, 198 Fed. 1.

3. The Court instructed the jury that they might return a five-sixths verdict as provided by Laws 1913, C. 63. The defendant claims that this was error; that the cause of action came from an act of Congress; and that it was entitled to a jury such as is contemplated by the federal constitution. The State Court had jurisdiction. The law of the forum as to what constitutes a lawful jury applies. The character of the cause of action does not determine it. The five-sixths jury law is authorized by the State constitution and is not prohibited to the State by the federal constitution. It is not meant that a federal court sitting in this state would apply our five-sixths jury law. That question is not here. The instruction of the Court was correct.

For the reasons stated in the first paragraph of the opinion there must be a new trial.

Order reversed and new trial granted.

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**CONSTITUTIONAL AND STATUTORY PROVISIONS OF THE STATE
OF MINNESOTA CONCERNING A VERDICT BY LESS
THAN TWELVE JURORS.**

Sec. 4, Article 1, Constitution of Minnesota.

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy, but a jury trial may be waived by the parties in all cases in the manner prescribed by law; and the legislature may provide that the agreement of five-sixths of any jury in any civil action or proceeding, after not less than six hours' deliberation, shall be a sufficient verdict therein.

Sec. 7805 Statutes of Minnesota, 1913.

In all civil actions or proceedings in any court of record of this state, after twelve hours' deliberation, the agreement of five-sixths of any jury therein shall be a sufficient and valid verdict; the deliberation of the jury shall be deemed to have commenced when the officer taking charge of the jury has been sworn, and the clerk shall enter such time in his records.

Sec. 7806 Statutes of Minnesota, 1913.

Where the verdict is agreed to by the full membership of the jury the foreman only shall sign the verdict, when less than the full number agree on the verdict the same shall be signed by all the jurors who concur therein, and the clerk of said court shall enter on his minutes the number of said jurors concurring in said verdict.

STIPULATION MADE UPON TRIAL.

It is stipulated and agreed between the parties in this case as follows: The locomotive in question had been used in the hauling of freight trains over defendant's line of road referred to in the pleadings, which freight trains hauled both intrastate and interstate commerce, and that it was so used after the plaintiff's injury, and that the last time the engine was used was on the 18th day of October when it came into Marshalltown so pulling a freight train; that the first time it was used after plaintiff's injury was on the 21st day of October, when it pulled such a freight train out of Marshalltown.

EVIDENCE.

We state in narrative form and quote from the testimony of the plaintiff George Winters as follows:

The day I got hurt we were putting on tires on a locomotive, on the driving wheels. There were three of us working at it: myself, Mr. Larson and Mr. Conn. Conn was the machinist; Larson and I were helpers. We commenced work on that engine early in the morning. We got a gasoline heater to heat the tires. We took the old tire off. There were two driving wheels on each side. We finished putting on the new tire before I got hurt. The engine was in the roundhouse when we done the work; it was on a track; there were fourteen tracks in the roundhouse, I believe.

The driving wheels were raised off of the rails when we were putting on the tire; the engine was jacked up. I did not help to jack it up; it was jacked up the day before, on Sunday, the 20th, and I got hurt on Monday. There

were four jacks in the back, in the rear. The jacks were under a casting, two at each end; they were screw jacks. We had nothing to do with the screw jacks, did not raise or lower them.

There was a block across under the front of the engine; the front of the engine was raised off of the tracks also; the block was on top of the trucks, the trucks weren't raised up; the front end of the engine was raised; we didn't raise it; the rear end of the engine rested upon jacks and the front end rested upon a timber across the top of the truck.

Conn, the machinist, told Larson and I to get some jacks, "we got to jack this engine up", and we got two hydraulic jacks, and Conn told us to put them under the front end and jack it up, and we put them under the beam that runs across the front of the engine; we placed the jacks outside of the rails and he told us to jack up and we did.

At this point we quote from plaintiff's direct examination as follows:

Q. How were those hydraulic jacks operated?

A. With a lever.

Q. How did the lever work?

A. Up and down.

Q. Was that lever permanently attached to the jacks or not?

A. No, sir.

Q. How was it placed in the jacks?

A. Well, there was a little socket on the side, and we placed it in there.

Q. To raise the jack what did you do?

A. Well, you just pump up on it.

Q. How did you work the lever?

A. Up and down motion.

Q. Was there any special lever for those jacks?

A. Yes, sir.

Q. What was it like?

A. Well, it has a long handle with a lug on it to keep the jack from going down.

Q. On what part of it was this lug?

A. Well, it is on the end that went into the socket.

Q. What was the use of that lug?

A. To keep the jack from going down.

Q. How did it do that?

A. Well, there is a little lug there and it stops right there and it can't go no further.

Q. What stops?

A. Why, the handle.

Q. In raising the jack, which way is the pressure applied to that lever, upwards or downwards?

A. Well, it is upward.

Q. Well, the jack goes up, but does the lever go up when—

A. No, the lever goes down.

Q. The lever is raised up without force, and then forced down; is that the idea?

A. Yes, sir.

Q. And that forces the head of the jack up?

A. Yes, sir.

Q. Now, what do you do if you want to lower the head of the jack?

A. Well, you turn the wrench over and just push down on it.

Q. And how far do you have to push the lever down?

A. Well, below a catch there, or something.

Q. How's that?

A. Below a catch.

Q. What catch?

A. Well, it is on the jack there.

Q. Below the point where you would operate if you were raising it?

A. Yes, sir.

Q. Does this lever go into the same socket whether you are lowering or raising it?

A. Yes, sir.

Q. At the time that your machinist told you to get these jacks what had you done with the tire up at that time?

A. Well, we had put all the tires on.

Q. So that the work of putting on new tires had been finished before you had anything to do with these hydraulic jacks?

A. Yes, sir.

Q. You spoke of trucks under the front part of the engine; what do you mean?

A. Well, they are just a little truck there, with wheels on it.

Q. How many wheels?

A. There is four on it, two on a side.

Q. Two on each side, so that the front part of the engine had rested upon that truck and the rear part of the engine upon those four screw jacks during the time that you were putting on the new tire?

A. Yes, sir.

Q. You spoke about the front end of the engine resting upon a beam, or there being a beam under it. What did you refer to,—something permanent attached to the engine?

A. No, sir.

Q. What then?

A. Why, they just had a long log right on top of the truck, and the engine was down on that.

Q. So that the engine wasn't resting directly upon the trucks?

A. No, sir.

Q. But upon a log that was placed on top of the trucks?

A. Yes, sir.

Q. You refer to it as a log. Was it a rough log or a square piece of timber?

A. Well, it was just a square piece of timber. It wasn't square, it was long, and perhaps a foot and a half wide, and nine inches thick.

Q. How high was this hydraulic jack?

A. Well, I think they are about twenty-six inches.

Q. Twenty-six?

A. Or something like that.

Mr. Miner: Now, what do you mean, when it was extended or when it wasn't extended?

Q. When the head was down as low as it could go, how high was it?

A. Well, I should judge it was about twenty-six inches, something like that.

Q. Now, when the head was raised up as high as it would go, how high would it be?

A. Well, I don't know just how high it would be. It probably would be about thirty inches anyhow, or more, probably.

Q. When you got the jacks and placed them did the head come up to the bottom part of that timber or that beam under the engine, or not?

A. No, we had a block on the top of the jack.

Q. What kind of a block?

A. A little square block.

Q. Of what size?

A. Well, I don't just recollect what size it was now.

Q. Well, have you any recollection as to how large it was, how thick and wide and long?

A. Well, probably four or five inches thick and square.

Q. And when you say square, do you mean the same width that it was in thickness?

A. Well, a little longer; it was about ten inches long, I believe, or something like that.

Q. Was it wood?

A. Yes, sir.

Q. You say about four or four and a half inches thick and four and a half inches wide and about ten inches long?

A. Yes, something like that.

Q. Now, that was placed on top of the head of the jack?

A. Yes, sir.

Q. Did the jack stand on the floor of the roundhouse?

A. Yes, sir.

Q. Now, having so placed the jacks and these blocks on top of them what was the next thing that was done?

A. Well, the machinist told us to jack them up.

Q. Do you refer now to the same machinist that you named as Mr. Conn?

A. Yes, sir.

Q. And what did you do then?

A. We jacked it up, and he pulled out that log in between there, we helped him pull it out, and then he says, "Let her down."

Q. Well, now, just a moment. You say "we jacked them up." Did you handle the one jack or did both of you work on the same jack?

A. No, sir; I handled one and Larson handled the other one.

Q. Which jack did you handle?

A. On the right side.

Q. And which jack did you get and place under the engine?

A. I got the one on the right side.

Q. Who handled the jack on the left side?

A. Larson.

Q. Who jacked that one up?

A. Mr. Larson.

Q. Do you know what kind of a lever he used in that jack?

A. Well, I don't know what kind of a lever he had in it at all.

Q. You have spoken about a lever with a lug on the side of it. What kind of a lever did you use in your jack?

A. Well, I had a regular lever with a lug on it.

Q. Now, you say that Mr. Conn told you to jack it up and that you did jack it up?

A. Yes, sir.

Q. You worked on the right side, you say?

A. Yes, sir.

Q. Larson on the other side?

A. Yes, sir.

Q. At that time was there anyone else working around the engine?

A. Well, there was some fellows working in the back of around the—to one side back to the rear.

Q. Do you know how many?

A. Well, I don't just know how many there were.

Q. Was there anyone there handling those jacks besides you and young Larson?

A. No, sir.

Q. Now, you say Conn told you to jack it up, and did you jack it up?

A. Yes, sir.

Q. Then you say what was done?

A. Well, we took that timber out that was on top of the truck.

Q. That is the timber that the front part of the engine was resting on?

A. Yes, sir.

Q. And having taken that timber out, then what was done?

A. Well, Mr. Conn says let the engine down, so we started letting it down.

Q. How did you do that?

A. Well, we just turned the wrench over and started letting it down.

Q. You say turned the wrench over?

A. Yes, sir; that was in the jack.

Q. What do you mean by wrench?

A. Well, the handle for the jack.

Q. The lever that you had been using?

A. Yes, sir.

Q. You say you turned that over; why did you turn it over?

A. Well, so it would go down.

Q. And having turned the lever over what did you do then?

A. Well, we started letting the engine down.

Q. How did you do that?

A. Just pushed down on the handle.

Q. And what happened then?

A. The engine went down, and Mr. Conn says it doesn't line up.

Q. And what then?

A. He says jack it up again.

Q. What did you do then?

A. We jacked it up again.

Q. And what then?

A. And then he got a timber and he put it alongside of the cylinder and tried to throw the engine over, and says, "Let your jack down." So I let my jack down on the right side, and then he put this timber there and couldn't throw it over that way, and he says, "Jack it up again." So I jacked my side up again, and he took the timber out.

Q. That is, this timber that he had placed against the side of the engine?

A. Yes, sir.

Q. Now, while you were doing that work of lowering and raising your side of your jack with Conn handling this timber that he placed against the side of the engine, what was being done with the other jack, the Larson jack?

A. Well, I don't know; he didn't touch his jack, I don't believe.

Q. Well, the order that Conn gave to lower the jack—

A. Well, he says to us that—standing there in front, he says, "You boys lower your jack."

Mr. Miner: Now, which order are you referring to?

Q. Which order is that, the first one or the second or the last?

A. Well, that is the first one.

Q. The first order. That was after you had taken out the timber that was on top of the trucks that the front of the engine rested on?

A. Yes, sir.

Q. His order then at that time was addressed to both of you?

A. Yes, sir.

Q. Then the next order was to raise it again?

A. Yes, sir.

Q. And was that addressed to one or both of you?

A. To both of us.

Q. Then the next order, to whom was it directed?

A. Well, he told me to let my jack down?

Q. And did you comply with that order?

A. Yes, sir.

Q. You left that jack down, and then what?

A. And he put this block there. He had the block in first.

Q. Oh, he put the block in first?

A. Beside the cylinder, yes.

Q. And told you to let your jack down?

A. Yes, sir.

Q. And did you do that?

A. Yes, sir.

Q. And then what did he say?

A. Well, he says we can't do it that way, he says, jack it up again.

Q. Now, to whom was that last order directed?

A. To me.

Q. And did you jack it up again?

A. Yes, sir.

Recess until 2 P. M.

Q. We stopped this forenoon at the point where you said Conn had instructed you to raise your jack after he had placed this block against the side of the engine and you had lowered it, then he told you to raise your jack again?

A. Yes, sir.

Q. Did you raise it?

A. Yes, sir.

Q. What was the next thing then done?

A. Well, he took the block out that was under the cylinder there, and he says, "Let your jack on down," he says, "we can't do it that way." And I let my jack down. Then we stood there four or five minutes, and he says, "You boys take your jacks to the rear of the engine."

Q. What did you do then?

A. Then I started to take my jack out, push the block off, and when I pushed the block off, why, the engine fell.

Q. And what happened when the engine fell?

A. Well, it caught my hand on top of the jack and under the pilot beam.

Q. The block that you say you started to remove from the top of your jack, was that the block that you had placed on top of your jack when you first put the jack under the engine?

A. Yes, sir.

Q. Now, whereabouts were you at the time he gave the order to take the jacks to the rear?

A. Standing on the right side of the engine to the front.

Q. Where was Larson at that time?

A. He was standing right there with me.

Q. To whom did Conn address that last order?

A. He addressed it to both of us.

Q. At that time that he so addressed that last order to you was your jack tight or not?

A. No, my jack was loose.

* * * * *

We quote from his cross-examination as follows:

Q. And you went to work then and did the work you described in bringing this heater up and in loosening the tires on the drive-wheels of this engine and taking the old tires off and then putting the new tires on. Up to that time the engine was standing with four jacks to the rear, and the front part resting upon a square timber lying across this truck; that is true, is it?

A. Yes, sir.

Q. After you got those tires on, then you proceeded to lift up this front part of the engine in order to take this timber out that was lying across that truck?

A. Yes, sir.

Q. And to do that you or this young man Larson went and got a couple of jacks like that jack setting there?

A. Yes, sir.

Q. And you placed one under the right-hand end of the pilot beam, and Larson placed the other under the left hand end of the pilot beam?

A. Yes, sir.

Q. And you lifted the front of the engine up above this casting and this timber just enough to loosen that timber.

A. Yes, sir.

Q. Then Mr. Conn told you to let that part down?

A. Yes, sir.

Q. That was for the purpose of letting that part of the casting enter into the round hole into that casting?

A. Yes, sir.

Q. When you let it down the edge of that casting there had moved a little to one side, so that it didn't enter into that place, and it rested on this rim that you see around there, the engine wouldn't go into place; that is true, isn't it?

A. Yes, sir.

Q. That showed that the boiler had moved over a little bit to one side so that the castings weren't in alignment; that is true, isn't it?

A. Well, that is what Conn told me.

Q. Well, you know that there was some reason why they didn't come together, didn't you?

A. Yes, sir.

Q. And then he told you to raise your jack up again?

A. Yes, sir.

Q. And then he went and got a timber and stood one end down on the ground and put the other end up against the side of the engine where you were and told you to let your jack down, so that the strain against that timber, he thought, would force the front end of the engine over a little bit. You did that, didn't you?

A. Yes, sir.

Q. And when you let it down, the pressure of this timber standing at an angle with one end on the ground and the other end against the steam-chest, didn't push the boiler over so that the castings came together properly, did they?

A. No, sir.

Q. And Conn said you can't do it that way?

A. Yes, sir.

Q. Then you say that this jack that you had, just like this, had a square block four inches in thickness lying right on top of it there?

A. Well, I wouldn't say just what size of block it was; that was just my judgment.

Q. Well, that is the third time you have testified in this lawsuit, isn't it?

A. Yes, sir.

Q. And both times before you said you had a block four inches in thickness, didn't you?

A. Well, we had a block.

Q. Well, you testified before it was four inches in thickness; do you want to change that now?

A. No, sir.

Q. Well, then, there was that wooden block lying right down on top of this hydraulic jack?

A. Yes, sir.

Q. And you had let the jack down so that there was a half-inch space between the under side of the block and the pilot beam?

A. The jack was loose, yes.

Q. You had let the jack down so that there was about half an inch of space between the under side of the block and the pilot beam?

A. Yes, sir; it was loose.

Q. And that was the condition it was in when Mr. Conn told you boys to take your jacks to the rear?

A. Yes, sir.

* * * * *

We quote from the testimony of Elmer Larson as follows:

Direct Examination.

Q. How much did you jack up when you worked your jack?

A. I jacked it up high enough to take the weight off of the block that was there.

Q. What kind of a block do you refer to? What was that block like?

A. The beam that was across from the engine trucks to hold the weight of the boiler up.

Q. Was it in front or behind the pilot beam?

A. It was behind the pilot beam.

Q. And when you so jacked up your jack did George jack up on his side also?

A. Yes, sir.

Q. Now, when you got it jacked up what did you do then?

A. We took the beam out.

Q. Do you recall which side you took that out, to your side or George's side?

A. It was to my side.

Q. After you got that piece of timber what was said or done then?

A. We let the engine down.

Q. Who said that?

A. The machinist.

Q. That is, you are referring to Conn now?

A. Yes, sir.

Q. And what did you do then?

A. I let my jack down.

Q. And what happened then or what took place then?

A. He said that the engine never lined up.

Q. How's that?

A. He told us the engine never lined up.

Q. Who told you that?

A. Conn.

Q. And what else, if anything, did he say?

A. That we should jack it up again.

Q. And did you?

A. Yes, sir.

Q. What took place then after you jacked it up the second time?

A. Why, he had Mr. Winters let his jack down to see if he could throw it over.

Q. You said he had Winters let his down?

A. Yes, sir.

Q. Did you hear what he said about that? What Conn said about that?

A. No, sir.

Q. Well, did Winters leave his down then?

A. Yes, sir.

Q. And then what was done, if anything?

A. He jacked it up again.

Q. That is, Winters jacked his up again, then after that?

A. Yes.

Q. Did you hear Conn say anything at the time?

A. No, sir.

Q. Well, now, after George jacked up his jack the last time what was done then?

A. He put the block against the cylinder.

Q. Who did that?

A. Conn.

Q. And where were you when he was doing that?

A. I was standing in front of the engine.

Q. And after Conn had put the block against the cylinder what was done then?

A. Winters let his jack down.

Q. And why did he leave it down, did Conn say anything about it?

A. I don't know whether he was under order or not.

Q. On which side of the engine was this block put against the cylinder?

A. On the right-hand side.

Q. And that is the side that George Winters was working on?

A. Yes, sir.

Q. Did George leave his jack down after this block had been put against the cylinder?

A. Yes, sir.

Q. And then what was done?

A. He said that he couldn't do it that way.

A. Conn.

Q. And then what?

A. And then he was talking to the foreman, and then he told us to take jacks to the rear of the engine.

Q. Who was talking to the foreman?

A. Conn.

Q. That is the foreman of the roundhouse?

A. No, he was talking to the foreman of the back shop.

Q. What was his name?

A. Winter.

Q. Did you hear what the talk was?

A. No, sir.

Q. Well, then what was done when Conn said take your jacks to the rear?

A. I started over toward my jack, and just as I got there reaching for my jack, the engine went down.

Q. And is that the time that George was caught?

A. Yes, sir.

Q. Had you done anything with your jack before the engine came down? I mean now, after you had been told to take your jack to the rear. You say you started and walked over to your jack after Conn said take your jack to the rear?

A. Yes, sir.

Q. What I am inquiring about is as to whether you got to your jack and done anything with it before the engine came down.

A. No, sir.

Q. What position was your jack in when you left it and walked ~~around~~ in front of the engine?

A. It was straight up and down.

Q. Well, was the top of it against the pilot beam or not?

A. Yes, sir.

Q. What was the last thing that you had done with your jack before this accident?

A. We jacked it up.

Q. And the head of the jack was against the bottom part of the pilot beam at that time?

A. Yes, sir.

Q. Was the weight of the engine resting on the jack at that time?

A. Yes, sir.

Q. After you had jacked up your jack the last time had you done anything with it after that, with the jack, in any way, until the engine came down and caught George's hand?

A. No, sir.

Q. Now, what kind of a lever were you using on your jack?

A. An open-ended wrench.

* * * * *

Q. Then do I understand that when you finished jacking up the last time and walked around in front of the engine, the open-end wrench which you had been using as a lever was in the jack?

A. Yes, sir.

Q. And when Conn told you to take your jacks to the rear and you walked back towards your jack, this open-end wrench was still in the jack?

A. Yes, sir.

Q. Did you get to it to take hold of it at all, or did you take hold of it at all before the engine came down and Winters' hand was caught?

A. No, sir.

* * * * *

Q. And the first thing that you did with the hydraulic jack that day was after you had put the tire on?

A. Yes, sir.

Q. And when you were jacking it up after having placed the jack under the end of the pilot beam, do I understand you that you had some trouble with it?

A. Yes, sir.

Q. What was the trouble?

A. It worked hard, it slipped on me.

Q. What do you mean by slipping on you?

A. Well, it went down every once in a while.

Q. You were trying to work it up and in place of its going up it would go down?

A. It would go down.

Q. And what took place then, what was said and done then?

A. He told me that I didn't know how to work it.

Q. Who told you that?

A. Mr. Conn.

Q. How did he happen to say that to you?

A. Well, he seen me having trouble with it.

Q. And what did he do after telling you that you didn't know how to work it?

A. He came and jacked it up.

Q. And did he finish jacking it up entirely?

A. Yes, sir.

* * * * *

We quote from the testimony of the expert witness, Charles Winters:

Direct Examination.

Q. How are the hydraulic jacks operated when you want to raise them up, Mr. Winters?

A. Pump them up and down with the lever there.

Q. What is the construction of the jack that enables you to pump it up and raise it?

A. Well, there is a plunger inside of it that pumps the oil or liquid, whatever they use in it, and there is a valve there that it works, and there is a valve in the bottom of the piston that goes down in there, and a leather around that cup, leather that holds the pressure; you pump the liquid out of the top down into the bottom through these valves, and it raises the jack.

Q. You speak of there being a piston. Now, what do you call the piston to this, the part of it between the top or the head and the bottom?

A. Yes, sir; the part that goes down into the cylinder there.

Q. Now, that piston, is it permanently attached to either the bottom or the top?

A. No, sir; it screws on to the top there and free at the bottom, to go up and down.

Q. Well, then it is permanently attached to the top if is is screwed on?

A. Yes, it is screwed on. You can remove it by—

Q. And works freely in the bottom?

A. Yes, sir.

Q. You say there is oil in the top, and also in the bottom of the jack?

A. Oil in the bottom when you pump it in.

Q. How do you get the oil into that?

A. Pump it in there through that—

Q. Into the top or into the bottom?

A. Oh, to fill it, you mean?

Q. Yes.

A. A little screw there on top of it, you take it out and pour it in there.

Q. This screw here?

A. Yes, sir.

Q. Then when you raise it which way is that oil pumped, down from the head?

A. Yes, sir.

Q. And how does it get into the bottom?

A. That plunger there forces it in.

Q. Is there a hole through the center of the piston that goes down?

A. Yes, sir. The plunger works inside of it.

Q. A plunger works inside of what?

A. Inside of the piston there.

Q. So that by this pumping operation you force the oil out of the head of the jack into the bottom?

A. Well, it draws it out of the head; when you raise up

the lever the valve opens and lets the oil go down through, and when you push down it shuts the valve and forces it down through the valve in the piston there, under the piston.

Q. How much can you raise this head by that operation?

A. Eleven inches, them jacks, if they are working right.

Q. Is there anything that holds the head up after you have it pumped up other than the oil that is below the end of the piston?

A. No, sir.

Q. The pressure, then, on the head of the jack is all on the oil that is in the bottom of the jack?

A. Yes, sir.

Q. When you have it up how do you lower it?

A. Turn the lever over and press down on it, press it down.

Q. Now, when you refer to the lever you mean the lever I hold in my hand?

A. Yes, sir.

Q. The one with the lug on the one side?

A. Yes, sir.

* * * * *

Q. Now, Mr. Winters, this Exhibit B which I hold in my hand, is that the kind of a lever that you say you turn upside down and use when you are wanting to lower the jack?

A. Yes, sir.

Q. What is the purpose of the lug on the one side of this lever?

A. That is to keep from tripping the jack when you are jacking it up.

Q. If you are raising it you enter it in the jack the way I have placed it now?

A. No, sir, you have got it wrong side to.

Q. You didn't catch my question. If you are raising the jack, you mean it should go in from the other side?

A. Yes, sir.

Q. Oh, when you are raising the jack you enter it with the lug down?

A. Yes, sir.

Q. And when you want to lower it you take it out and turn it with the lug up?

A. Yes, sir.

Q. The effect of so turning it with the lug up leaves the handle go lower down?

A. Yes, sir.

Q. What is the effect on the jack of so lowering the lever beyond the point where it catches the lug if the lug side is down?

A. It allows that plunger to travel down far enough to trip the valve in the bottom of the piston and opens it.

Q. And the tripping of the valve in the bottom of the piston does what?

A. That lets the oil back up into the head and the jack goes down.

Q. Does the valve open at one particular point, or does the lever have to pass through considerable space in order to complete the opening of the valve?

A. Well, after it touches the valve it only has to open it about a sixteenth of an inch, something like that.

Q. Well, what I mean is, with the use of this lever in the manner that is intended to open it, does it make any difference how much you use the lever in order to open it?

A. How long you hold it down or—

Q. Yes.

A. Why, as long as it is down there the jack goes down. It will go right down if you leave it there.

Q. Well, what I am trying to get at is this: Now, the lug is on the lower side and it is down to the bottom?

A. Yes, sir.

Q. Will the jack trip, that is, will it open that valve in that position, that leaves the oil go to the bottom or go to the top?

A. No, sir.

Q. How much lower must you get the lever in order to open the valve that permits the oil that is in the bottom to go to the top?

A. The length of that lug that is on there.

Q. About length of the lug?

A. Yes, sir.

Q. Just by turning it over and leaving it go as far as it will go down, the lever opens it?

A. Yes, sir.

Q. Then do I understand that that valve which so permits the oil that is in the bottom to go to the top, opens at a given point?

A. Yes, sir.

Q. And it matters not whether the lever goes farther than that or not?

A. No, sir.

Q. The moment the lever reaches that given point the valve is opened right then?

A. Yes.

Q. Then if you leave the lever remain in the position, down low enough to open it, does the top go clean down or only part way?

A. It goes clear down if you leave it there.

Q. How could you stop it from going clean down?

A. Raise up on it.

Q. Raise up the handle?

A. Yes, sir.

Q. If the lever is left in and not touched after it has been lowered to the opening point of the valve, it means that the head of the jack will go to the bottom?

A. Yes, sir; it will go right down.

Q. The reverse of that, however, is not true; when you are raising it every motion of the lever will raise it up a certain distance?

A. Yes, sir.

Q. And if you stop, why, the jack stands there, is that right?

A. Yes, sir.

Q. So that you may raise the jack either one inch or two inches or five or eight or ten or eleven, just as you want to?

A. Just as you want; yes, sir.

Q. And it will stand just where you stop pumping?

A. Yes, sir.

Q. But no difference whether you have it up one inch or five inches or ten inches, if you want to lower it and trip the valve in the bottom of the piston, it will go clean to the bottom?

A. Yes, sir.

Q. Is that right?

A. Yes, sir, it will go clear to the bottom unless you raise up on the lever.

* * * * *

Q. Supposing that engine was standing in the round-house at Marshalltown, Iowa, the wheels all on, the driving-wheels, and the rear of the engine was resting upon four screw jacks placed underneath the iron that runs across the rear of the rear part of the engine, two of the screw jacks being on one side and two on the other, and the front of the engine had been raised up by two hydraulic jacks of the kind this is here in court, one of those hydraulic jacks on either side of it and under the ends of the pilot beam, so that the engine was so resting upon those screw jacks at the rear and the two hydraulic jacks at the front, and that the hydraulic jack on the right side had been lowered so that it was free from the pilot beam, and that a wrench similar to Exhibit B here had been used in this jack on the left-hand side when it was last pumped up, and that wrench had been left in the jack when so last pumped up, would that open-end wrench so let in settle down of its own accord and trip that jack?

A. Yes, sir; it would.

* * * * *

Upon the last trial of the case plaintiff called two witnesses who did not testify upon the first trial; their names were Joseph Lang and Frank Martin.

We quote from the testimony of Joseph Lang:

Q. As you were sitting there which way were you facing?

A. I was facing towards the engine where they was working on.

Q. That is, towards the engine that Winters was working on?

A. Yes.

Q. And as you sat there then looking towards the engine that Winters was working at you would be looking at which side of his engine, the right side or the left side?

A. I couldn't look on the right side of the engine, because I couldn't see through.

Q. No. That is, the right side of Winters' engine was next to you?

A. The right side of Winters' engine was off of me.

Q. How's that?

A. Now, that was on the other side; I couldn't see the right side of his engine.

Q. Oh, you were looking at the left side of his engine?

A. At the left side.

Q. That this, Winters' engine was to the west of your engine?

A. Yes.

Q. And you were looking—

A. I was looking west on his engine, on the right side, is all I could see, his engine the right side, but not the left side—the left side I could see, but not the right side.

Q. In other words, you could see the fireman's side, which is the left side of the engine?

A. Yes.

Q. And not the right side, which is the engineer's side?

A. Yes.

Q. From where you were sitting could you see George Winters at all?

A. I could see him only up to his shoulders. Of course, I was sitting down, and the engine was high enough, all I could see him walk around, but that is all.

Q. You could see under Winters' engine and see him on the other side?

A. Well, no, I couldn't. Of course, I could see him once in a while, but not all the time.

Q. Before the accident had you noticed that they were using hydraulic jacks under the front end of their engine, the Winters' engine?

A. Yes.

Q. Now, as you sat there under your engine, could you see the jack on the left-hand side of the Winters' engine?

A. Yes.

Q. Did you see it?

A. Yes.

Q. What was the first thing that attracted your attention to anything wrong with the Winters' engine, that is, as to Winters being hurt?

A. After Winters was hurt?

Q. What happened when he did get hurt?

A. Oh, I kept looking out there, and when the engine dropped I seen that jack was down on the left side, that jack was down with that wrench in there. I jumped out then, run up on the left side to his engine, and I seen that he was fastened, his hand, and that is all, I paid any attention to it. Then I just run away pretty near in the center of the roundhouse to where his old man worked under an engine down in the pit, he was under an engine, and I told him that his boy got hurt, to hurry up and go down there.

Q. Did you notice whether there was any lever in that jack on the left-hand side of the Winters' engine?

A. Yes, wrench.

Q. How's that?

A. The wrench was in there.

Q. The wrench was in there?

A. Yes.

Q. And by a wrench do you mean an instrument like this that I hold in my hand?

A. Yes, just about like that.

Q. Is it what you call an open-end wrench?

A. An open-end wrench.

* * * * *

We quote from the testimony of Frank Martin:

Q. What engine were you worknig on the day Winters got hurt?

A. At the time he got hurt I was working on the same engine.

Q. Working on the same engine that Winters was working on?

A. Yes, sir.

Q. Who else was working on that engine at that time?

A. I think that another machinist by the name of Peter Griffin was working there.

Q. And anyone else?

A. Well, there was George Winters and Dode Conn and young Larson.

Q. Then as you recollect it, there were five of you working on that engine at the time Winters got hurt?

A. Yes, sir.

Q. What work were you doing at the time he got hurt?

A. I was instructed to put on main rods and connect up the brake rigging.

Q. And what were you in fact doing? You say you had been instructed to do those things; what were you actually doing when he got hurt?

A. I was putting on the nuts on the bolts on the strap in the back end of the main rod.

Q. On which side of the engine?

A. On the right side.

Q. That is the side he got hurt on?

A. Yes, sir.

Q. How close to Winters were you working?

A. Oh, it is at least twelve feet; twelve or fifteen feet.

Q. What was the first thing that attracted your attention to something having gone wrong?

A. Well, the noise it made when it came together, when the castings came together and I heard George scream.

Q. What did you do then?

A. I jumped up and went up there to where George was.

Q. And what did you find when you got to him?

A. Well, Conn, the machinist, was there starting to let the jack down, and he hadn't turned the jack handle over, and I grabbed Conn and shoved him to one side, kind of to one side, and told him to let it down, and I at the same time grabbed hold of the jack handle—or after I had shoved Conn aside, I grabbed hold of the jack handle and turned it over, and then Conn came with me and so we pushed it down and released his hand.

Q. Then what did you do?

A. Well, I went out, we walked about, well, out past the front of the engine, and about—well, if the engine was facing this way, we walked out kind of this way, kind of towards the window, and George pulled off his glove.

Q. And then did you take any notice of the jack on the left-hand side?

A. There was some one came running up there, and I looked in that direction, around on the opposite side of the engine from where I was, and I saw then that the jack was down.

Q. That is the jack on the left hand side?

A. Yes.

TRIAL JUDGE'S CHARGE TO JURY.

Gentlemen of the jury: The plaintiff, George H. Winters, prosecutes this action against the defendant, Minneapolis & St. Louis Railroad Company, to recover damages to compensate him for injuries to his person, received on October 21, 1912, while he was working as a servant for the defendant company in its roundhouse or shops at Marshalltown, Iowa, and which injuries the plaintiff claims happened to him because of the negligence of the defendant company. While in his pleading he sets up a number of alleged acts of negligence, as I recall the evidence, they are, by the testimony at this trial, reduced to practically one,—that the defendant company failed to furnish to the servant, with whom the plaintiff was working, a reasonably safe instrumentality, called a hydraulic jack, which was operated by an instrument called a wrench instead of one spoken of as a lever.

It appears uncontradicted that the plaintiff with another employe of the defendant named Larson, were engaged, at the time of the injury, in raising the front end of a locomotive, and to do so, these hydraulic jacks were used, the plaintiff using one on the right-hand side and Larson the one on the left. The plaintiff's claim is that the jack in charge of the plaintiff was operated by a lever, having what is called a lug on it, and the one operated by Larson by what is called a wrench, and that this wrench was not a reasonably safe instrumentality.

The defendant, on the other hand, insists that this wrench was a reasonably safe appliance and that it does not appear from the evidence that the use of the wrench had anything to do with the happening of the accident. You have heard all the evidence for and against these claims and have observed the wrench itself in action before you, and you are the sole judges.

The defendant claims that it was impossible for this jack on Larson's side to fall of its own weight and thus cause the locomotive to fall and injure the plaintiff. The jury are sole judges of the facts in the case. You are sole judges of the testimony that has been given before you by every witness and of what credit you will attach to the testimony of each witness and if what reasonable deductions and conclusions you will draw from all the proven facts and circumstances of the case. The fact that the locomotive did fall and injure the plaintiff is not sufficient, standing alone, to permit or authorize the jury to award him damages for his injuries against the defendant company. Before the plaintiff can charge the defendant for his injuries he must satisfy you by a fair preponderance of the evidence (which means a fair overweight of the evidence) that he suffered this injury because of the negligence of the defendant company in failing to furnish its employe Larson with a hydraulic jack, reasonably safe instrumentality for the purpose used and with a reasonably safe appliance to operate this jack with.

I have said that the defendant company was not an insurer of the safety of the plaintiff. It was not an insurer, but as the master, the defendant company owed the plaintiff the duty to use reasonable care to furnish its servant Larson, with whom the plaintiff worked on this loco-

tive, instrumentalities reasonably safe with which to do the work required of them at that time.

Now, negligence is best defined by telling you what is meant by the term "reasonable care." Reasonable or ordinary care is that prudence, foresight and care which persons engaged in like work or business would use under the same facts and circumstances or under similar facts and circumstances, and failure to use such care is negligence. If, after considering carefully all the evidence, you are not satisfied that the defendant company was negligent in the furnishing of this jack in question to Larson and the appliance to work it, then, as I view the evidence, there is nothing upon which you could base a finding for the plaintiff and your verdict should be for the defendant. If, on the other hand, you are satisfied from the evidence, after careful consideration, that the instrumentalities furnished Mr. Larson on that occasion were not reasonably safe and that as a result of that the locomotive was caused to fall upon the plaintiff's hand and injure him, then the plaintiff is entitled to recover in this action unless you also find that the plaintiff, in the manner in which he acted just about the time of the accident, assumed the risk of the situation.

It is claimed by the defendant that the plaintiff, after he had removed a block, I think, from the top of the jack, rested his hand upon the top of the jack in such position, as they claim, that it was not necessary at all for him to do and that he knew if he kept his hands there and the locomotive should fall, he would be injured, that he thereby assumed the risk. I charge you that a man who knows all the facts and circumstances attending the situation and appreciates the risks that he runs when he places him-

self in a position to be injured, then he thereby assumes the risk of such situation and he cannot recover.

Now, if you find that this young man assumed the risk, then he cannot recover in this case. But, on the other hand, if you find that he did not assume the risk, then you will disregard that feature of the case.

It has also been claimed by the plaintiff that even if it should be found that the plaintiff, Mr. Winters, did not assume the risk of this situation, that at any rate he was guilty of contributory negligence in the manner in which he placed himself at the time and just immediately before the accident happened.

Now, the law charged Mr. Winters with the same duty to care for himself as the law charged the defendant the duty of furnishing reasonable appliances. He was bound to use reasonable care, that care which a person of ordinary and reasonable prudence and foresight would use under the same circumstances and a man of this age would use under the same circumstances to care for himself. If you should find that the plaintiff did not use that care, then you could determine that he was guilty of contributory negligence. Contributory negligence, however, under the laws of the United States, under which this action is being tried, would not debar the plaintiff from recovery, if you find otherwise that he is entitled to recover. I will explain to you, as I go along, what the effect of contributory negligence would be under such circumstances.

Now, gentlemen of the jury, if, after a careful, painstaking, unbiased and unprejudiced consideration of all the evidence in this case you determine that the plaintiff is entitled to recover a verdict, then you will next consider the question of his damage. That question is left in the

law to the unprejudiced, calm, judicial discretion of you twelve men as men of affairs applying that discretion to the proven facts and circumstances of the case. You have a right to take into consideration the character of the injuries suffered by the plaintiff, the pain of mind and body suffered by him, the length of time that he was confined during the recovery, as far as there can be any recovery in this case, of the wounded hand, and you have a right to take into consideration the character of the injury on the hand and the fact that necessarily it is a permanent injury. Taking all these matters into consideration it will be your duty to award him such damage for his injuries as in the exercise of that calm judgment I have spoken of would compensate him for the injury.

Now, in case you should determine that Mr. Winters, the plaintiff, was guilty of contributory negligence, then you will apply that fact in this way: I have said it does not debar him from recovery, but you will reduce the amount of his recovery in the proportion in which you find his negligence contributed towards the entire negligence in the case; that is, the combined negligence of the plaintiff and the defendant in what proportion the plaintiff's negligence contributed and deduct that amount on account of his contributory negligence.

Take the case, gentlemen.

The form of your verdict will be, if you find for the plaintiff, We, the jury, find for the plaintiff and assess his damages at the sum you determine he should recover. If you find for the defendant, of course the form of your verdict would simply be, We, the jury, find for the defendant.

Under the practice law of this state, the jury, when their verdict is unanimous, will bring in a verdict signed by

your foreman. If, however, after being twelve hours in consultation after you go out with this case, you are unable to make an unanimous verdict, then any ten or eleven of your number may determine what the verdict should be, and those ten or eleven will each sign his individual name to that verdict.

STATE OF MINNESOTA, DISTRICT COURT,
County of Ramsey, Second Judicial District.

GEORGE H. WINTERS,

Plaintiff,

against

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,

Defendant.

We, the jury in the above entitled action find a verdict in favor of the plaintiff and assess his damages at the sum of Eight Thousand Dollars.

ELLIS J. NEWELL, Foreman.

St. Paul, March 24th, 1915.

COMPLAINT.

Plaintiff for and as his complaint against the above named defendant, states and avers:

That the defendant now is and at and during all the times herein mentioned and referred to as has been a corporation and as such the owner and operator as a common carrier of a line of railway extending in and through the states of Minnesota, Iowa, and other states, with its headquarters in the state of Minnesota. That defendant's said line of railway is an interstate highway and now is and at and during all the times herein mentioned and referred to has been operated by defendant in the hauling, as such common carrier, of interstate commerce between said several states and other states and countries. That at the time plaintiff was injured as hereinafter set out, he was employed by defendant in said interstate commerce business.

That the plaintiff, George H. Winters, is a minor, being under the age of twenty-one years, and the Capital Trust Company of St. Paul, Minnesota, has been by said court duly appointed guardian ad litem for the purpose of representing said minor in the prosecution of this action, and it has accepted said trust.

That on October 21st, 1912, the said plaintiff, George H. Winters, was in the employ of defendant and was working for it in the city of Marshalltown, in the state of Iowa, in defendant's said business of a common carrier of interstate commerce. That the particular work which plaintiff was doing on said date and at the time he was injured, as hereinafter stated, was helping to make running repairs upon a locomotive engine which the defendant owned and was operating upon its said line of railway in the doing of said interstate commerce business, and the said locomotive had been customarily so used by defendant and was intended so to be used; that said work consisted in

putting new tire on the driving wheels of said locomotive, and to do so said wheels of said locomotive had to be raised off of the rails on which said locomotive was standing, and it was so raised by the use of jacks; that plaintiff received the injuries herein complained of by virtue of the sudden dropping of one end of said locomotive which was resting upon a jack; that the said jack, by virtue of the facts herein stated, gave way and permitted said locomotive to so drop; that said jack was insufficient and defective to the knowledge of defendant, and it carelessly and negligently so used said jack; that defendant carelessly and negligently permitted the said one end of said locomotive to rest upon said one jack, which jack was at one side of said locomotive; that said jack was operated by the use of a lever, and defendant carelessly and negligently furnished an improper lever; that at the time plaintiff was injured, defendant carelessly and negligently left said improper lever in said jack and the same did cause said jack to give way and so permit said locomotive to so drop; that said handle should not have been left in said jack; that if a proper handle had been furnished by defendant, the leaving of it in said jack would not have caused said jack to give way and permit said locomotive to so drop.

That defendant carelessly and negligently furnished and provided an incompetent servant to use and handle the said jack and lever which so caused said locomotive to so drop; that defendant carelessly and negligently failed and neglected to instruct the said servant who was so handling and using said jack and lever which so caused said locomotive to drop, as to how to use said jack and the said lever, and as to not leaving said lever in said jack;

that defendant carelessly and negligently failed to provide and enforce rules and regulations for the proper and safe doing of said work; that defendant carelessly and negligently adopted and was carrying out an improper and dangerous method of doing said work; that defendant carelessly and negligently failed and neglected to warn and instruct plaintiff of the dangers incident to the doing of said work; that defendant carelessly and negligently failed and neglected to furnish and provide proper and sufficient tools and appliances for the doing of said work, and by and through each and all of said facts, defendant did carelessly and negligently cause, permit and allow the said locomotive to so drop and fall upon one of plaintiff's hands when he was so engaged and so working, and his said hand was thereby crushed and bruised and part of it had to be and was amputated because of said injuries, and said injuries have wholly and completely and permanently disabled plaintiff's said hand and disfigured the same, and said injuries have caused and will in the future cause plaintiff to suffer great bodily pain and mental anguish, and by virtue of all the facts herein averred, plaintiff has been damaged in the sum of Twenty-five Thousand Dollars (\$25,000.00).

That at the time of receiving said injuries, plaintiff was in the exercise of due care on his own part and no want of care on his part contributed to his said injury.

That the work which plaintiff was doing when so injured, was in connection with the use and operation by defendant of its said line of railway, and the work which defendant was so doing upon and with said locomotive at the time plaintiff was so injured, was in connection with the use and operation of said line of railway, by de-

fendant. That plaintiff was so injured in the said City of Marshalltown in the said State of Iowa.

That at the time plaintiff was so injured, there was in full force and effect in the State of Iowa, statutory laws of said state which were and are as follows:

"Sec. 2071. LIABILITY FOR NEGLIGENCE OR WRONGS OF EMPLOYEES. Every corporation operating a railway shall be liable for damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agent or by any mismanagement of the engineers or other employees thereof, and in consequence of the wilful wrongs whether of commission or omission of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway in or about which they shall be employed and no contract which restricts such liability shall be legal or binding. Nor shall any contract of insurance, relief, benefit or indemnity in case of injury or death entered into prior to the injury between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs or legal representatives after the injury from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section, but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received."

"Sec. 1. CONTRIBUTORY NEGLIGENCE. That the law as it appears in Section Twenty hundred and seventy-one (2071) of the supplement to the Code of 1907 be amended by adding after the period at the end of said section, the following:

"That in all actions hereinafter brought against any such corporation to recover damages for the personal injury or death of any employee under or by virtue of any of the provisions of this section, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages

shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier or corporation of any statute enacted for the safety of employees contributed to the injury or death of such employee; nor shall it be any defense to such action that the employee who was injured or killed assumed the risks of his employment." Approved March 25th, A. D. 1909.

That by virtue of the facts herein stated, plaintiff has been damaged in the sum of twenty-five thousand dollars (\$25,000.00).

Wherefore, plaintiff demands judgment against said defendant for the sum of twenty-five thousand dollars (\$25,000.00) together with his costs and disbursements herein.

AMENDED ANSWER.

Comes now the above named defendant and for its amended answer to the complaint of the plaintiff herein made pursuant to permission granted upon the trial of said cause in open court on the 11th day of December, 1913, respectfully states:

Defendant admits that at the time stated in plaintiff's complaint it was and is a corporation and owned and operated a railroad in and through the states of Minnesota, Iowa and other states, and that it was and is engaged in interstate commerce.

Admits that on October 21st, 1912, the plaintiff, George H. Winters, was in the employ of the defendant and was working for it in the city of Marshalltown, in the state of

Iowa, as a machinist's helper, but this defendant denies that said George H. Winters was employed by it in its business of interstate commerce.

This defendant admits that at the time and place stated the said George H. Winters received some injury to one of his hands.

Except as hereinbefore admitted, this defendant denies each and every allegation in said plaintiff's complaint contained and each and every part thereof.

Further answering said complaint, this defendant avers that the injuries received by the said George H. Winters at the time and place stated were due solely to his own carelessness and inattention to his own safety and because of the failure of the said George H. Winters at said time to observe for his own protection ordinary care, and that such omission on the part of the said George H. Winters was the proximate cause of any injuries by him received.

Further answering said complaint this defendant alleges that the particular work being done by the said Winters was dangerous only because of the manner in which said Winters chose to perform the same; that the danger of performing the work in the manner selected by him was perfectly obvious to said Winters; was fully comprehended and appreciated by him, and that he assumed the risk of the very consequences which came to him from so performing said work.

Wherefore, defendant prays that plaintiff take nothing by his said action, that the same be dismissed and that defendant have and recover herein its costs and disbursements as provided by law.

REPLY.

Plaintiff for his reply to the answer of the defendant in the above entitled action, states and avers:

That he specifically denies the allegations of said answer, and every part and portion thereof, and the whole thereof.

Wherefore, plaintiff reaffirms the allegations of his complaint and continues to pray for the judgment therein demanded.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 912.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,
Plaintiff in Error,

vs.

GEORGE H. WINTERS,
Defendant in Error.

**DEFENDANT IN ERROR'S SUPPLEMENTAL
BRIEF.**

Defendant in error submits the above cause upon his brief served and filed on his Motion to Affirm or Dismiss, with the following additional authorities. We so submit the case because plaintiff in error has not served any brief on the merits except the one served on said motion.

The following are cases involving the repair of cars and engines used in the doing of an interstate commerce busi-

ness, in all of which it was held that the employee so engaged was employed in interstate commerce:

Walsh v. N. Y., N. H. & H. R. R. Co., 223 U. S. 5, 32 S. C. Rep. 169.

Darr v. B. & O. Ry. Co., 197 Fed. 665.

B. & O. Ry. Co. v. Darr, 204 Fed. 751.

Law v. Ill. Cent. Ry. Co., 208 Fed. 869.

N. P. Ry. Co. v. Maerkl, 198 Fed. 1.

Chicago, K. & S. Ry. So. v. Kindlesparker, 234 Fed. 1.

So. Pac. Co. v. Pillsbury, 170 Cal. 782, 151 Pac. 277.

We respectfully submit that the judgment of the Supreme Court of Minnesota should be affirmed.

HUMPHREY BARTON,

JOHN H. KAY,

Attorneys for Defendant in Error,

St. Paul, Minnesota.



**MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY
v. WINTERS.**

**ERROR TO THE SUPREME COURT OF THE STATE OF
MINNESOTA.**

No. 420. Argued December 5, 1916.—Decided January 8, 1917.

When a state court applies the Federal Employers' Liability Act to an action governed by the state law, the error is not ground for reversing the judgment upon the complaint of a party who did not oppose but invoked and relied upon the application of the federal statute.

In such circumstances, however, this court will not pass upon questions concerning negligence and assumption of risk if the facts touching the plaintiff's employment are stated and agreed and fail to make a case within the federal act.

The injury occurred while plaintiff was repairing an engine. The

engine had been used in interstate commerce before the injury and was so used afterwards, but there was nothing to show that it was permanently or specially devoted to such commerce, or assigned to it at the time. *Held*, not a case within the Federal Employers' Liability Act.

131 Minnesota, 181; *id.* 496, affirmed.

THE case is stated in the opinion.

Mr. Frederick M. Miner, with whom *Mr. William H. Bremner* was on the brief, for plaintiff in error.

Mr. Humphrey Barton, with whom *Mr. John H. Kay* was on the briefs, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries suffered by the plaintiff, the defendant in error, at Marshalltown, Iowa, on October 21, 1912. The decisions below will be found in 126 Minnesota, 260 and 131 Minnesota, 181; *id.* 496. The declaration alleged that at the time the plaintiff was employed by the defendant in interstate commerce, although it went on to set forth laws of the State of Iowa concerning the liability of railroads and contributory negligence. It alleged that the injury was caused by the negligence of the defendant in failing to furnish a reasonably safe instrument for the work that the plaintiff was set to do. The answer denied among other things that the plaintiff was employed in interstate commerce and set up the plaintiff's negligence and assumption of the risk. In the course of the trial, the facts touching the employment having been agreed, the counsel for the defendant intimated that he might want to take the question whether the commerce was interstate to this court, but said no more about it and later moved to dismiss the suit upon

the ground, among others, that the plaintiff assumed the risk, adverting to a decision that that defence was open under the federal act. Later still the presiding judge in his charge, without objection, told the jury that the action was tried under the law of the United States; and in the assignment of errors to the Supreme Court of the State one error assigned was that the jury was instructed that they might find a less than unanimous verdict in a suit founded upon the Federal Employers' Liability Act—a proposition disposed of since the trial by a decision of this court. *Minneapolis & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211.

It is true that error is assigned because the court affirmed its opinion rendered after a former trial. But in the assignment of errors to the state court no such error is alleged, and beyond judicial recitals that the evidence with some exceptions was the same at both trials and quotations from the decision as to negligence, the record shows nothing but a casual statement of counsel as to what was done or ruled before. In short, at the trial the defendant in no way saved its rights to deny that the parties were engaged in interstate commerce at the time of the accident or to object to the application of the federal statute. On the contrary without qualification it invoked and relied upon that statute and the rights that because of that statute it supposed itself to possess. There is an ambiguous assignment of error that the Supreme Court of the State erred in holding as matter of law that the plaintiff was engaged in interstate commerce and in holding that the question of the plaintiff's assumption of the risk was for the jury "thereby depriving the appellant of a right guaranteed to it under the provisions of" the Federal Employers' Liability Act. But if the first clause is more than an introduction to and reason for the second, then, as we have indicated, no foundation for such an assignment was laid in the proceedings before the state courts.

Therefore even if the courts and parties were wrong about the proper basis for the suit that fact does not entitle the defendant to have the judgment reversed. It cannot complain of a course to which it assented below.

The defendant, however, as has been seen, did save the questions concerning its right to a unanimous verdict and the assumption of risk under the act of Congress and also concerning the evidence of its negligence, all of which, of course, in a case arising under the act could be brought to this court. In the present case the facts upon which the act of Congress was supposed to apply are stated and were agreed, so that although, for the reasons that we have stated, an error on that point would not entitle the defendant to a new trial, it necessarily must be determined whether they show a foundation for the attempt to come here upon the questions that were reserved. The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine "had been used in the hauling of freight trains over defendant's line . . . which freight trains hauled both intrastate and interstate commerce, and . . . it was so used after the plaintiff's injury." The last time before the injury on which the engine was used was on October 18 when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the States. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might

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Counsel for Parties.

be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time not upon remote probabilities or upon accidental later events.

Judgment affirmed.